UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	U.S. EPA DOCKET NO.
CYRIL PETROCHEMICAL CORP.,	)	RCRA VI-001(h)-00-H
ET AL.	)	
CYRIL, OKLAHOMA	)	
	)	
EPA I.D. NO. OKD982558900	)	RECOMMENDED DECISION
	)	
RESPONDENTS	)	
	)	

INTRODUCTION

The Environmental Protection Agency (EPA), through the Compliance Assurance and Enforcement Division Director, issued an initial administrative order (IAO) against Cyril Petrochemical Corporation (CPC), Oklahoma Energy Corporation (OEC), and John A. Rayll, Jr. (Rayll) under Section 3008(h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(h). Respondents Rayll and OEC challenged issuance of the IAO, and respectively, requested a public hearing under 40 C.F.R. Part 24.[1] Both parties alleged they were neither

[1] Respondent CPC neither opposed the IAO, nor requested a hearing under 40 C.F.R. Part 24. Under 40 C.F.R. § 24.05(a), an IAO becomes a final administrative order thirty (30) days after service of the order, unless the respondent files a response to the IAO and requests a hearing. Such response and request for a hearing must be filed with the Regional Hearing Clerk. As such, Respondent CPC is liable and responsible for the performance of corrective action as prescribed in the IAO. Note however, this Recommended Decision discusses the liability of CPC, as necessary to fully explain the liability

owners nor operators of the CPC facility located in Cyril, Oklahoma.[2] Respondent OEC contends it fails to own the land upon which the CPC facility is located. Respondent OEC also contends it does not control the activities at the Cyril facility due to the lack of control over CPC's stock. Respondent Rayll contends it should not be liable because it only owns the stock of CPC, and did not participate in the environmental management and operation of the CPC facility. EPA believes both parties are liable as owners and operators of the CPC facility. Such belief is based upon the parties alleged ownership, control and operation of the CPC facility.

For the reasons set forth in the discussion below, this tribunal recommends holding OEC (the current operator responsible for the environmental management of the facility) liable as an operator responsible for the conduct of corrective action under Section 3008(h) of RCRA. This tribunal also recommends removal of Respondent Rayll as a liable party (owner/operator). These recommendations are based upon the preponderance of the evidence and legal analysis relevant to whether the Respondents are liable under

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recommendations concerning Respondents OEC and Rayll.

[2] The facility is an inoperative petroleum products manufacturer, currently storing and managing hazardous waste.

RCRA Section 3008(h). Accordingly, this tribunal recommends the IAO be modified and issued as a Final Order, in a manner consistent with this Recommended Decision.[3]

I. BACKGROUND

PROCEDURAL BACKGROUND

EPA filed and issued an IAO on October 6, 2000, against several Respondents, including CPC, OEC, and Rayll. The IAO required said Respondents to conduct investigations and take corrective action under RCRA Section 3008(h), 42 U.S.C. § 6928(h). Respondent Rayll forwarded a request for hearing on November 6, 2000, while Respondent OEC requested a hearing on November 16, 2000. On November 29, 2000, the Regional Administrator selected a Presiding Officer to conduct the pre-hearing, hearing and post-hearing proceedings in accordance with 40 C.F.R. § Part 24, Subpart C.

Consequently, this tribunal issued a Pre-hearing Scheduling Order and Notice of Hearing on December 21, 2000,

[3] As mentioned earlier, Respondent CPC (the current owner of the land and structures attached thereon at the CPC Cyril, Oklahoma facility) did not in any form or fashion, challenge the IAO as specified in 40 C.F.R. § 24.05(a). As such, Respondent is liable and responsible for the conduct of corrective action under Section 3008(h) of RCRA. While this Recommended Decision discusses the liability of CPC as relevant to the overall case analysis and discussion, it does not alter CPC's liability and responsibility under RCRA 3008(h) and 40 C.F.R. § 24.05(a).

after conducting a December 19, 2000, pre-hearing conference. The above Notice of Hearing set the public hearing for May 30, 2001. Due to several reasons, but most important, the inability of Respondent OEC to secure the services of key personnel, this tribunal issued an Order Enlarging the Pre-hearing and Hearing Schedule. The above Order notified the parties of the newly scheduled hearing date, June 20, 2001. Subsequent requests (June 9, and June 13, 2001) for postponement of the June 20, 2001, public hearing were denied by written Order dated June 14, 2001, and a verbal Order on June 18, 2001, during the final pre-hearing conference.

Consistent with the enlarged pre-hearing and hearing schedule, on March 9, 2001, Respondent OEC submitted its memorandum and position on the facts, law and relief sought by EPA. Respondent Rayll submitted his memorandum on the facts, law, and relief sought on February 4, 2001. On April 16, 2001, EPA replied to the memorandums submitted by the Respondents.

Despite having the opportunity under the enlarged pre-hearing and hearing schedule, neither Respondent filed a request to submit up to twenty-five (25) written questions to EPA. By June 8, 2001, all parties were required to exchange information/documents intended for use at the June 20, 2001,

public hearing. On June 8, 2001, EPA submitted twelve (12) exhibits (outside of documents already included in the administrative record supporting issuance of the IAO) it intended to use at the public hearing.

As it concerns the 40 C.F.R. Part 24, Subpart C, public hearing conducted on June 20, 2001, this tribunal issued an order setting the hearing agenda on May 11, 2001. During the conduct of the June 20, 2001, public hearing held at the EPA Regional office in Dallas, Texas, this tribunal admitted the IAO administrative record documents into the hearing record. Additional exhibits were offered by the parties for entry into the hearing record. Several were admitted while others were excluded.[4] The transcript of the public hearing was finalized and filed with this tribunal on July 25, 2001.

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[4] One particular document (Respondent Rayll Exhibit No. 1) offered for introduction into the hearing record by Respondent Rayll was rejected, as it was simply repetitive of other materials included in the RCRA Section 3008(h) hearing record, and was not submitted timely. *See* 40 C.F.R. §§ 24.14(e), 24.15(b); Hearing Record Transcript at pp. 68-70. Further, in clarifying this tribunal's ruling on the introduction of EPA settlement/pursuit of compromise documents into the hearing record as evidence, such documents are deemed excluded to the extent they were offered to prove the validity of RCRA Section 3008(h) liability in dispute. However, these documents are deemed admitted for other purposes (e.g., to prove the motive or intent of a party, the knowledge of a party, the interest of a party). *See* Johnson v. Hugo's Skateway, 949, F.2d 1338, 1345-1346 (4th Cir. 1991), United States v. Austin, 54 F.3d 394, 399-400 (7th Cir. 1995); and Hearing Record Transcript at p. 35.

STATUTORY BACKGROUND

Congress enacted RCRA in 1976 to establish a comprehensive cradle-to-grave program for regulating the treatment, storage and disposal of hazardous waste. The RCRA program was necessary to address increasingly serious environmental and health dangers arising from waste generation, management, and disposal. *See* United Technologies Corporation v. EPA, 821 F.2d 714, 716 (D.C. Cir. 1987). While RCRA Section 3005(a), 42 U.S.C. § 6925(a), required owners and operators of facilities that treat, store or dispose of hazardous waste, to obtain a permit from either EPA or an authorized State, Congress realized EPA and authorized States did not have the resources to issue final permits to all affected facilities within the statutory time-frame allowed. As a result RCRA Section 3005(e), 42 U.S.C. § 6925(e), was enacted as a transitional measure. Under RCRA Section 3005(e), owners and operators of facilities in operation before November 19, 1980, are required to timely notify EPA of its hazardous waste operations, and apply for a permit (Part A application) before operations can continue under interim status. Interim status authorizes facilities to treat, store and dispose of hazardous waste until a final permit decision is made by EPA or an authorized State. Following achievement

of interim status, a facility must file a timely Part B application providing much more information than required in the Part A application.

As originally enacted, RCRA did not require permittees (owners and operators) to take significant remedial action to correct past mismanagement of hazardous waste. *See* American Iron & Steel Inst. v. EPA, 886 F.2d 390, 393 (D.C. Cir. 1989). Due to Congressional concern that releases from RCRA facilities posed a threat to human health and the environment, Congress amended RCRA in 1984 with passage of the Hazardous and Solid Waste Amendments (HSWA). HSWA provided EPA with authority to require permitted or interim status owners and operators of treatment, storage and disposal facilities to investigate and cleanup hazardous waste or constituents released into the environment. *See* 42 U.S.C. §§ 6924(u), (v) and 6928(h). The investigation and cleanup of hazardous waste at interim status facilities are referred to as corrective action in Section 3008(h). *See* 42 U.S.C. §§ 6928(h). EPA's corrective action authority allows issuance of initial administrative orders to interim status owners and operators. *See* 42 U.S.C. § 6928(h).[5] Upon request for a public hearing

[5] When an administrative order is issued unilaterally under RCRA Section 3008(h), the order is referred to as an

by the recipient of an order issued under Section 3008(h), EPA is required to conduct a public hearing if the request was made within thirty (30) days of service of the order. In 1988, EPA promulgated regulations to govern public hearing proceedings under RCRA Section 3008(h).

REGULATORY BACKGROUND

Initial administrative orders issued under RCRA Section 3008(h) only requiring corrective action are subject to the Rules Governing Issuance of and Administrative Hearings on Interim Status Corrective Action Orders (Rules), found at 40 C.F.R. Part 24. Provided the initial administrative order requires a respondent to undertake specified corrective measures, either alone or in conjunction with the RCRA Facility Investigation or Corrective Measures Study, then procedures in 40 C.F.R. Part 24, Subpart C (Hearings on Orders Requiring Corrective Measures), apply. *See* 40 C.F.R. § 24.08(b).

While both Subparts B (hearing procedures on orders requiring investigations/studies and/or inexpensive and technically simple interim corrective measures), and C (hearing procedures on orders requiring corrective measures alone or in conjunction with investigations/studies) set forth

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initial administrative order. *See* 40 C.F.R. § 24.02(a).

informal rather than formal adjudicatory procedures, Subpart C provides more formality than Subpart B. An example of heightened formality provided in Subpart C proceedings includes the respondent's right to request permission to submit twenty-five (25) written questions to the EPA concerning "issues of material fact in the order." *See* 40 C.F.R. § 24.14(d). Note however, both Subparts B and C's informal adjudicatory procedures do not afford the parties to the hearing the right to either call or cross-examine witnesses. *See* 40 C.F.R. §§ 24.11, 24.15. Under 40 C.F.R. §§ 24.11 and 24.15, the Presiding Officer may examine the representatives of each party.

The governing rules require the Regional Administrator to issue a final decision on initial administrative orders based upon the complete administrative record, including the public hearing record and comments on the recommended decision. *See* 40 C.F.R. § 24.18. Before the Regional Administrator issues a final decision, the Regional Administrator is required to designate a Presiding Officer to preside over pre-hearing, public hearing, and post-hearing proceedings. *See* 40 C.F.R. § 24.06. The Presiding Officer is authorized to issue orders governing the pre-hearing, public hearing, and post-hearing proceedings. *See* 40 C.F.R. §§ 24.10, 24.11 and 24.14.

Such orders normally include scheduling the public hearing, setting the agenda for the public hearing, scheduling submission of each party's memorandum on the facts and the law, deciding whether responses to a respondent's questions presented are warranted, scheduling submission of additional information before the hearing, and scheduling submission of post-hearing legal argument. The Presiding Officer is also authorized to recommend a decision to the Regional Administrator based upon the evaluation of the entire administrative record, including the public hearing record. *See* 40 C.F.R. § 24.17. Upon the parties receipt of the recommended decision, the parties are afforded the opportunity to file comments on the recommended decision within twenty-one (21) days of service. *See* 40 C.F.R. § 24.17. Upon completion of the recommended decision-making and comment process described above, the Regional Administrator renders a final decision.

I. LEGAL BASIS FOR CORRECTIVE ACTION, REVIEW AND BURDEN OF PROOF

Pursuant to applicable law found at RCRA Section 3008(h), before EPA initiates corrective action, the EPA Administrator makes a determination that there is, or has been a release of hazardous waste into the environment, from a facility

authorized to operate under RCRA Section 3005(e). Upon making the above determination, EPA may issue an order requiring corrective action or other response measures necessary to protect human health and environment. *See* 42 U.S.C. § 6928(h). Corrective action orders under Section 3008(h) must state with reasonable specificity the nature of the required response, and time-frame for compliance. *See* 42 U.S.C. § 6928(h).

In light of the above standard, applicable federal regulations require the Presiding Officer to review and evaluate the entire administrative record for corrective action orders challenged by a respondent. Thereafter, the Presiding Officer prepares and files a recommended decision with the Regional Administrator. *See* 40 C.F.R. § 24.17. Before issuing a recommended decision, the Presiding Officer performs a sequential evaluation of the case. First, the Presiding Officer must address all "material issues of fact or law properly raised by respondent." *See* 40 C.F.R. § 24.17. The recommended decision need not address immaterial issues of fact or law. This tribunal interprets the phrase "material issues of fact or law properly raised by respondent," to be analogous to the federal summary judgment standard set forth in Fed. R. Civ. P. 56. Therefore, a respondent must show that

any factual issue raised under 40 C.F.R. Part 24, is material. A factual issue is material when under applicable law (RCRA Section 3008(h) in this case), the fact might affect the outcome of the proceeding. In addition, factual issues must be properly raised. As such, a respondent must follow procedures set forth in 40 C.F.R. Part 24, and present sufficient and material probative evidence from which a reasonable decision maker could find in the respondent's favor.[6]

Next, the Presiding Officer must determine and recommend that the order be modified, withdrawn or issued without modification. *See* 40 C.F.R. § 24.17. Any modified IAO, withdrawal of the same or recommended decision to issue the IAO as a Final Order without change, must be supported by a preponderance of record evidence. If the Presiding Officer finds any contested relief provision in the order is unsupported by a "preponderance of the evidence" in the record, the Presiding Officer shall recommend that the order be modified and issued on terms supported by the record, or withdrawn. *See* 40 C.F.R. § 24.17. The Presiding Officer is

[6] A detailed analysis on the "genuine issue of material fact" standard can be found in numerous sources. Two examples include Celetox v. Catrett, 477 U.S. 317 (1986), and Manders v. Oklahoma ex rel. Dept. of Mental Health, 875 F.2d 263 (10th Cir. 1989).

required to provide an explanation and, a citation to record evidence relied upon. *See* 40 C.F.R. § 24.17(a).

This tribunal interprets the phrase "preponderance of the evidence" to mean evidence of greater weight or more convincing than other evidence offered in opposition. Sanders v. U.S. Postal Service, 801 F.2d 1328, 1330 (Fed. Cir. 1986). Stated differently, when evidence taken as a whole, shows the fact sought to be proved is more probable than not, then the "preponderance of the evidence" burden of proof is satisfied. With the legal standard for issuance of corrective action orders and burden of proof in mind, the below discussion reflects an evaluation of relevant and material issues of fact and law.

III. DISCUSSION, FACTUAL FINDINGS AND LEGAL CONCLUSIONS

To support issuance of the IAO, EPA essentially contends the IAO was based upon a release of hazardous waste or hazardous constituents, into the environment, at or from a facility subject to interim status requirements. *See* Hearing Record Transcript at pp. 11-14, 19-26.[7] Based upon the above release of hazardous waste, the Agency also contends the IAO includes corrective action necessary to protect human health

[7] While the Hearing Record Transcript refers to "F037" as "Ethel 37," this Recommended Decision corrects the typographical error as it occurs throughout the transcript.

and the environment, reasonably specific corrective measures, and a specified time for compliance. *See* Hearing Record Transcript at pp. 14, 90. Therefore, the Agency asserts the IAO was both, properly issued and consistent with the required legal basis. *See* Hearing Record Transcript at pp. 10-11. Any discussion concerning the validity of the October 6, 2000, IAO in question and its issuance to the Respondents, must begin by applying relevant statutes and regulations to material and relevant facts.

RELEASE INTO THE ENVIRONMENT

While RCRA does not define the term "release," the term release under RCRA was intended to be broad, and is consistent with the term "release" used under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *See* 42 U.S.C. § 9601(22).[8] *See* H.R. Conf. Rep. No. 98-1133, 98th Cong., 2d Sess. 110-111 (1984). As such, the term release is interpreted to include any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. Likewise, the term "environment" was intended to

[8] The Hearing Record Transcript refers to "CERCLA" as "CIRCA" and "CIRCLA." This Recommended Decision hereby corrects the typographical error as it occurs throughout the transcript.

be used in a broad manner. *See* H.R. Conf. Rep. No. 98-1133, 98th Cong., 2d Sess. 110-112 (1984). The term environment as used in RCRA 3008(h) may be used to address releases to surface waters, groundwater, land surface or subsurface strata and air. Courts have held entities liable for releases of hazardous wastes into the environment under RCRA 3008(h). *See* United States v. Indiana Woodtreating Corp., 686 F.Supp. 218 (S.D. Ind. 1988), and United States v. Clow Corporation, 701 F.Supp. 1345 (S.D. Ohio 1988).

Record information indicates that dating back to 1919 Anderson-Pritchard Oil Corporation (APCO) began producing a variety of petroleum products including gasoline, naphtha, asphalt, and non-chlorinated solvents. *See* Administrative Record at p. 00236; Hearing Record Transcript at pp. 18-19, 41. In 1978 the facility was purchased by the Oklahoma Refining Company (ORC) and petroleum-based products continued to be manufactured until September 1984. *See* Administrative Record at p. 00236; Hearing Record Transcript at pp. 19, 41. ORC declared bankruptcy in September 1984 and operations ceased. *See* Administrative Record at p. 00238.[9] A United

[9] From approximately 1919 to 1984, the waste generated at the site was generally disposed of in pits or land applied. *See* Administrative Record at pp. 00236-00238.

States Bankruptcy Court noted the extensive contamination at the ORC facility. *See* Administrative Record at pp. 01271-01273.

CPC (formerly known as Cyril Refining Company) purchased a portion of the 160-acre ORC facility in March 1987. *See* Administrative Record at pp. 01282-01299, 01299-1303. CPC purchased the northern portion of the facility, an area inclusive of the refinery process area. *See* Administrative Record at pp. 01280-01281, 00236-238; Hearing Record Transcript at pp. 17-18, 20, 41. During a May 1990 compliance inspection, it was discovered that CPC spilled phenol at the facility, demolished leaded gasoline storage tanks, sold scrap metal from the demolished tanks without decontaminating the metal, and improperly managed K052 hazardous waste (sludge at the bottom of the demolished tanks). *See* Administrative Record at pp. 01308-01309.

In 1991, Cayman Resources Corporation purchased CPC's stock with the intent of reopening the refinery for operations. *See* Administrative Record at p. 00238. Petroleum products manufacturing at the CPC refinery recommenced in January 1994 and ceased in April 1995. *See* Hearing Record Transcript at pp. 22, 59, 73; Hearing Record Transcript Government Exhibit, Volume II, No. 5 at p. 4. During the 1994

- 1995 manufacturing at the CPC refinery lasting approximately 16 months, the CPC facility produced liquified petroleum, kerosene, diesel, and stoddard solvent. *See* Administrative Record at p. 00220; Hearing Record Transcript at p. 22. The refinery generated new wastes during the 16-month operational period. *See* Hearing Record Transcript at p. 22.

During a CPC facility inspection in November 1994, the State of Oklahoma identified several potential violations of RCRA, including several storage violations. *See* Administrative Record at pp. 01342-01353. An EPA inspection in June 1998 found similar storage and management violations (storage of F037, K052 and D004 waste) at the CPC facility. *See* Administrative Record at p. 00225; Hearing Record Transcript at pp. 22-23. As a result, EPA characterized the CPC facility as an unregulated and inoperable treatment, storage and disposal facility currently storing hazardous waste without a permit. *See* Hearing Record Transcript, Government Exhibit, Volume I, No. 2, at p.2.

In light of the above operations, inspections conducted at the facility, and sampling and analysis of soil, groundwater, surface water, and surface water at the CPC facility, there were releases into the environment at the CPC facility. A June 1992 record of decision documenting the

releases of hazardous substances, hazardous waste and hazardous constituents at the CPC facility provide conclusive evidence of releases into the environment at the CPC facility. Provided below are some of the releases into the environment:

> 1) releases of benzene, toluene, ethylbenzene, xylene, naphthalene, 2–methyl naphthalene, lead, arsenic, and chromium on surface and sub-surface soils, and in the groundwater;
>
> 2) releases of beryllium, phenol, naphthalene, and polychlorinated biphenyls on the surface and sub-surface soils; and
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> 3) releases of friable asbestos on the ground, and releases of listed hazardous waste (F037, K052, D004) on surface soil and surface water. *See* Administrative Record, at pp. 01271-01273, 01313, 01317, 01351-01353, 01531, 01497-01499, 00225, 00243-00247, 00249-00261, 00743-00745; Hearing Record Transcript at pp. 12, 21-28.

Neither Respondent OEC, nor Respondent Rayll disputes the releases into the environment as cited in the IAO. With respect to releases to the environment, the Respondents failed to raise any issues sufficient to create a material case or controversy consistent with the procedures provided at 40 C.F.R. §§ 24.05(c), 24.17(a). As such, there is no real case or controversy presented by the Respondents for this tribunal to review as it relates to releases into the environment. *See* Powell v. McCormack, 395 U.S. 486, 496, N. 7 (1969). Based upon the above findings, this tribunal finds by a

preponderance of the evidence that releases into the environment occurred.

HAZARDOUS WASTE

As defined in RCRA Section 1004(5) the term "hazardous waste" is defined as:

> "... a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical chemical, or infectious characteristics may--
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> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
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> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5).

Hazardous wastes are solid wastes listed in Subpart D, 40 C.F.R. Part 261, and solid wastes which exhibit the characteristics of ignitability, corrosivity, reactivity, and EP toxicity. *See* 40 C.F.R. § 261.3, 261.21-24. Hazardous constituents are constituents listed by the Administrator in 40 C.F.R. Part 261, Appendix VIII, which have been shown to exhibit toxic, carcinogenic, mutagenic or teratogenic effects on humans and other life forms. *See* 40 C.F.R. § 261.11(a)(3). The evidence cited under a preceding heading (Release Into The Environment) lists several hazardous wastes and hazardous

constituents released into the environment.[10] Some of these include benzene, toluene, xylene, naphthalene, lead, arsenic, chromium, beryllium, phenol, D004, K052 and F037. *See* Administrative Record, at pp. 01271-01273, 01313, 01317, 01351-01353, 00225, 00243-00247, 00249-00261, 00743-00745; Hearing Record Transcript at pp. 12, 21-28.

Courts have found facilities liable under RCRA Section 3008(h) for releases of hazardous wastes and hazardous constituents into the environment. *See* United States v. Indiana Woodtreating Corp., 686 F.Supp. 218, 223 (S.D. Ind. 1988); United States v. Clow Corporation, 701 F.Supp. 1345, 1356 (S.D. Ohio 1988). Accordingly, from the evidence presented including inspections, and sampling and analysis to detect hazardous wastes and hazardous constituents at the site, this tribunal finds there were releases of hazardous wastes and hazardous constituents at the facility as contemplated by RCRA Section 3008(h).

[10] Neither Respondent OEC, nor Respondent Rayll contests the releases of hazardous wastes and hazardous constituents into the environment at the CPC facility. Accordingly, the Respondents failed to present a material case or controversy consistent with the procedures provided at 40 C.F.R. §§ 24.05(c), 24.17(a).

FROM A FACILITY

Under RCRA Section 1004(29), the term "solid waste management facility" includes –

> "...(A) any resource recovery system or component thereof,
> "(B) any system, program, or facility for resource conservation, and
> "(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise."

While EPA's federal regulations do not include the definition of "solid waste management facility," the term "facility" is defined at 40 C.F.R. § 260.10. The term facility is defined to mean:

> "...(1) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).
> (2) For the purpose of implementing corrective action under §264.101, all contiguous property under the control of the owner or operator seeking a permit under subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA 3008(h)." [11]

In light of the evidence discussed below, and included in the record of this RCRA Section 3008(h) proceeding, the tribunal

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[11] This definition was upheld in the case, United Technologies Corporation v. U.S. EPA, 821 F.2d 714 (D.C. Cir. 1987).

finds the CPC facility is in fact a "facility" as defined at RCRA Section 1004(29) and 40 C.F.R. § 260.10.[12] The CPC facility in question is an inoperative, petroleum-based products manufacturer continuing to store and manage hazardous waste onsite. *See* Administrative Record at pp. 00236-00238; Hearing Record Transcript at pp. 21-24, 27-28, 42-43, 48-49, 61, 75-76. This inoperative petroleum manufacturing facility is located in Caddo County on the eastern edge of Cyril, Oklahoma, at the intersection of U.S. Highway 277 and State Highway 8. The facility is bordered by Gladys Creek to the east, U.S. Highway 277 to the north, the City of Cyril to the west, and a tributary of Gladys Creek to the south. *See* Administrative Record at p. 00236. The CPC facility includes approximately 104-106 acres, and encompasses the northern portion of the larger ORC site. *See* Administrative Record at pp. 00236-238, 01280-01281, 01299-01303; Hearing Record Transcript at pp. 16-18, 20, 41; Hearing

[12] Neither Respondent requesting a hearing challenged whether the CPC facility satisfied the "facility" requirement as contemplated in RCRA 3008(h), and consistent with RCRA Section 1004(29) and 40 C.F.R. § 260.10. *See* Hearing Record Transcript at pp. 10-14, 39-41, 64-65. In fact, through the presentation of information at the hearing, the Respondents admitted the existence of a facility. *See* Hearing Record Transcript at pp. 39-43, 64-65.

Record Transcript Government Exhibits, Volume I, No. 6, at. p. 000039, and Volume 2, No. 2, at p. 000008.

From approximately 1919 through 1984, and during 1994 through 1995, the CPC facility utilized various refining processes.[13] These include crude distillation, vacuum distillation, fluid catalyst cracking, alkylation, bi-metallic reforming, and downstream processing. In order to employ such refining processes noted above, the CPC facility included refining process areas, an API separator, an F.C.C. Unit, a vertical still, an alkylation unit, an old reformer/desulfurizer, exchangers, pumps, asphalt blowers, a vacuum unit, power transformers, asphalt flow areas, asphalt pits, acid pits, a lime soda storage pit, an accumulator box, a warehouse, a process wastewater sewer, slop oil pits, sludge traps, air coolers, compressors, bulk storage tanks, unlined product and waste storage areas/pits, storm water ponds, ditches, wastewater treatment ponds and a land treatment area. *See* Administrative Record at pp. 00236-00238, 00254-00258, 01293-01294, 01300-01303; Hearing Record Transcript at p. 18. Clearly, the structures attached to the land and the land

[13] Based upon information discussed herein, the CPC facility became a storage and management facility in April 1995. Manufacturing operations generating hazardous waste disposed of onsite ceased in April 1995.

described above, used for treating, storing, or disposing of hazardous waste constitute a "facility" as contemplated by RCRA and implementing regulations.

Having found by a preponderance of the evidence that the CPC facility is a "facility" as contemplated by RCRA Section 3008(h), it is appropriate to assess the current status of the facility. The term "storage" as defined in RCRA Section 1004(33) includes:

> "...when used in connection with hazardous waste, [storage] means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(7).

Although the CPC facility is not currently producing any petroleum-based products, some of the hazardous wastes generated at the CPC facility remains stored in tanks located at the facility. *See* Administrative Record at pp. 00223-00225; Hearing Record Transcript at pp. 22-23, 42-43, 45; Hearing Record Transcript Government Exhibit, Volume I, No. 2, at p. 000009. These hazardous wastes including arsenic contaminated materials (D004), were managed and stored at the facility for a period of years dating back to 1994.[14] *See*

[14] In addition, note the definition of "hazardous waste management" under RCRA Section 1004(7). This definition includes in part, ... "the systematic control of ... storage ... of hazardous wastes." 42 U.S.C. § 6903(7).

Hearing Record Transcript at pp. 22-23; Hearing Record Transcript Government Exhibit, Volume I, No. 2, at p. 000009; Administrative Record at pp. 01351-01353.

Because hazardous waste is currently managed and stored on facility property, the CPC facility is a facility that remains "in operation." The term "in operation" includes a facility that "is ... storing ... hazardous waste." 40 C.F.R. § 260.10. The refinery area where management and storage of hazardous waste occurs, constitutes an "active portion" of the facility under 40 C.F.R. § 260.10. Without question, record evidence shows the CPC facility is not closed in accordance with the definition, "closed portion" provided at 40 C.F.R. § 260.10. *See* Administrative Record at pp. 00223-00225, 01351-01353; Hearing Record Transcript at pp. 22-23, 42-43, 45; Hearing Record Transcript Government Exhibit, Volume I, No. 2, at p. 000009.

OWNER/OPERATOR OF THE CPC STORAGE AND MANAGEMENT FACILITY

EPA argues adamantly that Respondents Rayll and OEC are liable as owners and operators as specified in the IAO. *See* Hearing Record Transcript at pp. 72-76, 78-83. With respect to Respondent Rayll, EPA contends Rayll has the authority to control operations at the facility and exerts control over Respondent CPC. As such, EPA believes Respondent Rayll is

liable as a stockholder who owns and operates (controls the operation) the CPC facility. *See* Hearing Record Transcript at pp. 73-74. Insofar as Respondent OEC is concerned, EPA alleges OEC is the successor to Cayman Resources Corporation, the corporate entity allegedly responsible for operation of the facility from 1994 to 1995, along with CPC. *See* Hearing Record Transcript at pp. 80-83.[15] As a result, EPA believes Respondent OEC is liable as an operator from 1994-1995, and as a current operator due to recent environmental management activities conducted by Respondent OEC. *See* Hearing Record Transcript at pp. 80-83.

Respondents Rayll and OEC outline several arguments to rebut the Agency's issuance of the IAO. Commencing with Respondent OEC, OEC cites to aggravated ownership disputes, difficulties in raising funds for the cleanup, and the timing of the proposed corrective action. OEC asserts it is not a responsible party for the cleanup under RCRA 3008(h) due to Respondent Rayll's current ownership interest in CPC, and CPC's ownership of land and facility structures located

[15] Record evidence filed with the State of Oklahoma demonstrates Respondent OEC is in fact, Caymen Resources Corporation with a new name. On June 11, 1997, Caymen changed its name to the Oklahoma Energy Corporation (otherwise referred to as OEC herein). *See* Hearing Record Transcript Government Exhibit, Vol. I, No. 8.

thereon. *See* Hearing Record Transcript at pp. 15, 39-40.[16] Respondent OEC contends CPC owns the land upon which the CPC facility is located, and CPC operated the facility during 1994-1995. *See* Hearing Record Transcript at pp. 39-40, 58-60. Similar to EPA's contentions, Respondent OEC also alleged that not only is Respondent Rayll the owner of CPC's stock, but also the current operator of the CPC facility. *See* Hearing Record Transcript at pp. 40-41. Both EPA and OEC specifically argue because Respondent Rayll is currently the sole stockholder of CPC and exerts control over CPC, Rayll is liable as an "owner" and "operator" of the CPC facility as contemplated under RCRA Section 3008(h). *See* Hearing Record Transcript at pp. 40-41, 72-74.

Respondent Rayll presents several reasons why he should not be liable and responsible for the corrective action specified in the IAO. These reasons include Respondent Rayll's ownership of CPC's stock and not the actual CPC facility, the failure to operate the CPC facility, the failure to possess the necessary resources or expertise to perform any cleanup activities, and the failure to receive any

[16] With respect to ownership, EPA and Respondents Rayll, and OEC do not dispute that the land and facility structures located thereon are owned by CPC. *See* Hearing Record Transcript at pp. 15-16, 39-40, 58-60, 64-65.

notification concerning his need to conduct a cleanup of the CPC facility. In addition, Respondent Rayll asserts his actions concerning the facility only included foreclosing on a debt, and attempts to find a buyer willing to purchase the CPC facility. *See* Hearing Record Transcript at pp. 64-65, 74-75, 87-88.

RESPONDENT RAYLL

In analyzing who currently owns and operates the CPC storage and management facility, RCRA and its implementing regulations provide substantial direction. Under RCRA Section 3005(e), owners and operators are required to both, notify EPA of its hazardous waste operations and file a Part A, RCRA permit application, in order to continue to operate under interim status. *See* United States v. Environmental Waste Control, Inc., 710 F.Supp. 1172, 1182 (N.D. Ind. 1989). Liability under RCRA 3008(h) may be imposed upon owners and operators of interim status facilities. *See* United States v. Clow Corporation, 701 F.Supp. 1345, 1356 (S.D. Ohio 1988). The term "owner" is defined as a "person who owns a facility or part of a facility." 40 C.F.R. § 260.10. As prescribed in 40 C.F.R. § 260.10 an "operator" is defined as, "... the "person" responsible for the overall operation of a facility." 40 C.F.R. § 260.10.

Although RCRA does not define the term "operator" the Supreme Court of the United States of America interpreted the term "operator" within the context of an environmental statute known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. United States v. Bestfoods, 524 U.S. 51, 52 (1998), ("To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct or conduct operations specifically related to the leakage, or disposal of hazardous waste, or decisions about compliance with environmental regulations").

Reliable and credible record information, including admissions by EPA and Respondent OEC, a purchase contract, a bill of sale and a loan agreement attached to a journal entry of judgment, demonstrate there is no legitimate dispute concerning CPC's ownership of the hazardous waste storage and management facility (the real property and attached structures). *See* Administrative Record at pp. 01280-01281, 01299-01303; Hearing Record Transcript at pp. 15-16, 39-40; Hearing Record Transcript Government Exhibit, Volume I, No. 6, at p. 000039. The term "facility" includes the real property on which the facility is located under 40 C.F.R. § 260.10.

See In Re National Cement Company, Inc. and Systech Environmental Corp., 5 E.A.D. 415, 421, N. 4 (EAB 1994).

The purchase contract and bill of sale documents cited previously leave no room for doubting CPC's ownership of approximately 104-106 acres of real property and structures located thereon, at the CPC storage and management facility. As such, CPC is the current "owner" of the CPC hazardous waste management facility located in Cyril, Oklahoma. Indeed, Respondent Rayll eludes the definition of "owner" as contemplated by applicable law and regulation, and is not directly liable under RCRA Section 3008(h).[17] If EPA and Respondent OEC wish to include stockholders of a company within the ambit of the definition "owner" as defined at 40 C.F.R. § 260.10, the proper process to pursue is an amendment of the RCRA rules. *See* In Re Southern Timber Products, Inc., d/b/a Southern Pine Wood Preserving Company and Brax Batson, 3 E.A.D. 880 (EAB 1992).

A stockholder (Respondent Rayll in this case) is treated as separate entity from the company owned (CPC in this action). It is horn-book law that the exercise of stockholder

[17] Respondent Rayll acquired 100% ownership of CPC stock effective on July 28, 1997. *See* Hearing Record Transcript Government Exhibit, Volume 1, No. 1; Administrative Record at pp. 00002-00009.

control granted by stock ownership does not create liability beyond the assets of the subsidiary. *See* United States v. Bestfoods, 524 U.S. 51, 61-62 (1998). In this instance, Respondent Rayll simply acquired ownership of CPC's stock in 1997 as a result of a foreclosure on an outstanding debt, and attempted to sell the CPC facility which did not produce petroleum-based products during his 100% stock ownership. *See* Hearing Record Transcript at pp. 64-65, 74-78.

Respondent Rayll actions failed to qualify him as an "operator" as well. *See* United States v. Bestfoods, 524 U.S. 51, 52 (1998). Clearly, Respondent Rayll did not manage, direct or conduct operations specifically related to the generation, disposal and storage of hazardous waste at the CPC facility. At the time of the June 20, 2001, hearing Respondent Rayll neither possessed a key to access the gated CPC facility, nor did he know who controlled access to the CPC facility.[18] *See* Hearing Record Transcript at pp. 64-65. With

[18] EPA nor Respondent OEC disputed Respondent Rayll's lack of access to the CPC storage facility. As such, record information is uncontroverted concerning this factual finding. In contrast, based upon OEC's knowledge and information, the keys to the facility are in the possession of the CPC facility "gatekeeper," a person (Mr. Val Henery, Plant Manager) who "sort of went with the site since about 1990." With OEC's knowledge Mr. Henery carried out functions (e.g., gate-keeping, covering of a man-way with access to a tank, development of a cleanup budget for the facility, and

respect the CPC facility, Respondent Rayll's actions were limited to satisfying a money judgment ($69,804.04 plus interest at 9.15% from Jan. 16, 1997) obtained by him against CPC. *See* Administrative Record at pp. 00002-00009. Respondent Rayll's attempt to obtain payment (by selling the CPC facility) for services provided to CPC fails to qualify him as "a person responsible for the overall operation of a facility." *See* 40 C.F.R. § 260.10.

In determining whether indirect stockholder liability (as an owner/operator in this case) is proper, utilization of the corpus of applicable state law is appropriate. *See* United States v. Bestfoods, 524 U.S. 51, 63-64 (1998). Oklahoma law considers a variety of factors when making an ultimate determination concerning indirect stockholder liability. These factors include whether:

> 1) The parent corporation (or stockholder) owns all or a majority of the capital stock of the subsidiary;
> 2) The parent (or stockholder) and subsidiary corporation have common directors and officers;
> 3) The parent (or stockholder) finances the subsidiary;

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submission of information to EPA to obtain the necessary permits), in the interest of the CPC facility and OEC. *See* Hearing Record Transcript at pp. 64-65, 74-76, 87-88; Hearing Record Transcript Government Exhibit, Volume II, No. 6, at p. 000112; Administrative Record at pp. 01538-01543.

> 4) The parent (or stockholder) subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;
> 5) The subsidiary has grossly inadequate capital;
> 6) The parent (or stockholder) pays the salaries or expenses or losses of the subsidiary;
> 7) The subsidiary has substantially no business except with the parent corporation (or stockholder) or no assets except those conveyed to it by the parent corporation;
> 8) In the papers of the parent corporation (or stockholder), and in the statements of its officers, the subsidiary is referred to as a department of division, or distinction between the parent (or stockholder) and the subsidiary are disregarded and confused;
> 9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation (or stockholder);
> 10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed; and
> 11) Subsidiaries do not have a full board of directors. *See* Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1379, N. 4 (10th Cir. 1980).

Courts will only disregard the corporate entity, such as CPC in this case, where fraud or illegal or inequitable conduct is the result of the use of the corporate structures. *Id.* at 1379. In this case the record shows the following:

1) Respondent Rayll acquired 100% ownership of CPC stock on July 28, 1997. *See* Hearing Record Transcript Government Exhibit, Volume I, No. 1; Administrative Record at pp. 00002-00009. However, by the time Respondent Rayll acquired the stock of CPC, CPC's manufacturing activities were already

inactive. CPC had already experienced the inability to pay suppliers of materials used in the manufacturing operations, and Respondent Rayll was not responsible for CPC's incorporation and initial undercapitalization. *See* Hearing Record Transcript at pp. 42, 58-59, 73, 78, 84-85; Hearing Record Transcript Government Exhibit, Volume II, No. 4, at p. 000042;

2) CPC was incorporated on September 10, 1986. *See* Hearing Record Transcript Government Exhibit, Volume II, No. 2 at p. 000008. At the time of CPC's (formerly known as Cyril Refining Corporation) incorporation, its stock was owned by OEC (formerly known as Cayman Resources Corporation from September 4, 1981, until a June 11, 1997, name change). *See* Hearing Record Transcript Government Exhibits, Volume II, No. 4, at p. 000020, and Volume I, No. 8, at p. 000020; Hearing Record Transcript at pp. 58-60;

3) CPC owns approximately 104-106 acres of real property and the CPC refinery located thereon. *See* Administrative Record at pp. 01280-01281, 01299-01303; Hearing Record Transcript Government Exhibits, Volume II, No. 4, at p. 000033, and Volume II, No. 6, at p. 000039; Hearing Record Transcript at pp. 15-16. Note however, the assets of CPC mentioned above were purchased by CPC and not Respondent

Rayll. *See* Administrative Record at pp. 01280-01281, 01299-01303;

4) CPC's corporate status was temporarily discontinued or suspended (since 1-29-99). Respondent Rayll is the registered agent for CPC, and record evidence fails to specify any Board of Directors and Officers for the suspended CPC. *See* Hearing Record Transcript Government Exhibit, Volume II, No. 2 at pp. 000006-000008. In addition to CPC's suspended corporate status, record evidence shows CPC has no current petroleum-based product manufacturing business activity, and past manufacturing operations were suspended in April 1995. *See* Hearing Record Transcript at pp. 22, 59, 73; Hearing Record Transcript Government Exhibit, Volume II, No. 5 at p. 4;

5) Since Respondent Rayll acquired the stock of CPC in July 1997, he attempted to sell the CPC facility. Also, Respondent Rayll does not possess funds to finance any CPC business activity. *See* Hearing Record Transcript at pp. 87-88. If any person financed CPC manufacturing operations, it was OEC.[19] *See* Hearing Record Transcript Government Exhibit,

[19] A corporation, OEC in this event (but also CPC), falls within the definition of a "person" as defined in RCRA Section 1004(15). *See* 42 U.S.C. § 6903(15).

Volume II, No. 4, at pp. 000025-000027. OEC engaged in financing activity with respect to CPC in the manner provided below:

a) OEC participated in securing a loan from the Oklahoma Finance Authority in November 1993 to start up the CPC refinery, and pursued additional financing during the year ending in December 2000. OEC intended to recommence CPC refinery manufacturing with the additional financing. *See* Hearing Record Transcript Government Exhibits, Volume I, No. 6, at p. 000034, and Volume II, No. 4, at pp. 000021-000022, 000025-000027, 000035, 000042, 000048-000049; Hearing Record Transcript at pp. 45-50.

6) OEC, rather than Respondent Rayll paid the monthly costs, and other expenses ($5,000 in costs incurred construction of a fence around the CPC facility) incurred at the CPC storage and management facility. *See* Administrative Record at p. 00010; Hearing Record Transcript at pp. 76, 84-85; and

7) Respondent Rayll, 100% stockholder of CPC, did not attempt to diminish the corporate identity of CPC. Once again, Respondent Rayll simply acquired ownership of CPC's stock, and attempted to sell the CPC facility. *See* Hearing Record Transcript at pp. 64-65, 74-78, 87-88. On the other

hand, the CPC refinery was referred to as the OEC Refinery Division on OEC's July 5, 2000, facsimile transmission cover sheet. *See* Administrative Record at p. 00010.

Having scoured record evidence to examine the relevant factors of indirect stockholder liability under Oklahoma law, this tribunal failed to find wrongdoings or inequities resulting from Respondent Rayll's purported use of corporate structures. As such, this tribunal will not depart from the general rule that a corporation and its shareholder are treated as distinct legal persons. Respondent Rayll is not a stockholder who failed to capitalize its corporate offspring from inception, or one who siphoned the economic lifeblood of the corporation. *See* Jerome P. Alberto, et al. v. Diversified Group, Inc., 55 F.3d 201, 206-207 (5th Cir. 1995).

Indeed, Respondent Rayll took no action concerning the initial capitalization and incorporation of CPC, but only foreclosed/executed on a judgment obtained against OEC (formerly known as Cayman Resources Corp.), obtained the stock of CPC previously owned by OEC, and proceeded to put the CPC facility on the selling block. This tribunal therefore declines EPA's and Respondent OEC's invitation to disregard the corporate existence of CPC. The preponderance of record evidence illuminates Respondent Rayll's lack of indirect

stockholder liability, as either an “owner” or “operator” of the CPC facility under RCRA Section 3008(h).

RESPONDENT OEC

OEC is the current operator of the CPC storage and management facility. Once again, as penned in 40 C.F.R. § 260.10, “operator” is defined as, “... the person responsible for the overall operation of a facility.” 40 C.F.R. § 260.10. The Supreme Court of the United States interpreted the term “operator” to mean the management, direction or conduct of operations specifically related to the leakage, or disposal of hazardous waste, or decisions about compliance with environmental regulations. *See* United States v. Bestfoods, 524 U.S. 51, 52 (1998). Thus, the material question before this tribunal is whether OEC’s recent and current activities at the CPC facility constitute operation.

Prior to OEC’s current activity at the CPC facility, record information identifies several corporations that operated the CPC facility dating back to 1919. However, OEC’s (formerly known as Caymen Resources Corporation until June 1997) potential operation of the CPC facility commenced in April 1994. While record evidence suggests OEC (when formerly known as Caymen Resources Corporation) may have operated the facility along with CPC during 16 months (April 1994 to Nov.

1995) of operation, OEC's operation of the facility crystallized from August 1999 through the June 2001 hearing. *See* Administrative Record at pp. 01338-01353; Hearing Record Transcript at pp. 42-50, 57-59, 64-65, 75-76, 82-85; Hearing Record Transcript Government Exhibits, Volume II, No. 5 at pp. 000057, 000060, and Volume II, No. 4, at pp. 000020- 000022, 000025-000027, 000035, 000042, 000048-000049. As a result, this tribunal focused its analysis from 1999 through the date of the public hearing. From August 1999 through June 2001, Respondent OEC engaged in several operational activities at the CPC facility including:

1) Assumption of control over the CPC facility. At the June 20, 2001, public hearing Respondent OEC discussed its current control over access to the CPC facility. *See* Hearing Record Transcript at pp. 64-65, 75-76. Based upon OEC's admission, knowledge and information, the keys to the facility are in the possession of the CPC facility "gatekeeper," and Plant Manager, Mr. Val Henery. *See* Hearing Record Transcript at pp. 64-65. Note that such gate-keeping functions are required under interim status facility regulations found at 40 C.F.R. § 265.14. By controlling access to the CPC facility, Respondent OEC also controls the storage of hazardous waste (e.g., tanks containing hazardous waste). Such control is

consistent with the definition of “hazardous waste management” under RCRA Section 1004(7). The definition of “hazardous waste management,” in part, includes ... “the systematic control of ... storage ... of hazardous wastes.” 42 U.S.C. § 6903(7).

2) Assumption of responsibility to mitigate dangerous conditions at the CPC facility. Respondent OEC admits during the beginning of the year 2001, it had discussions with EPA concerning an open man-way which accessed a tank storing hazardous waste. *See* Hearing Record Transcript at pp. 75-76, 82, 85-85. As a result, Respondent OEC decided to take appropriate action to mitigate potential harm to humans. The mitigating action in this instance involved OEC’s closure of the man-way in question. *See* Hearing Record Transcript at pp. 43, 75-76, 82, 84-85. The action taken to mitigate the potential harm to humans is consistent with 40 C.F.R. § 265.15. Such action also demonstrates OEC’s control over the stored hazardous waste located at the facility. OEC’s control and mitigating action constitute “hazardous waste management” under RCRA Section 1004(7);

3) Assumption of responsibility to prevent unauthorized access to the CPC facility. Respondent OEC also admits during June 2000 to June 2001, OEC commenced discussions with EPA

concerning the construction of a fence, and completed construction of a fence at the CPC facility. *See* Hearing Record Transcript at pp. 75-76, 82, 84-85. Respondent OEC decided to conduct and complete the facility improvement in order to comply with federal regulations, and mitigate the danger presented to the neighboring community located approximately 600 feet from the CPC facility. *See* Hearing Record Transcript at pp. 43, 75-76, 82, 84-85. Respondent OEC's actions were consistent with regulatory requirements found at 40 C.F.R. § 265.14. They also constitute "hazardous waste management" under RCRA Section 1004(7), designed to control the storage of hazardous waste in a manner protective of human health and the environment;

4) Assumption of responsibility for payment of maintenance expenses incurred at the CPC facility. *See* Hearing Record Transcript Government Exhibit, Volume II, No. 4, at pp. 000025, 000036, 000042. Respondent OEC paid the expenses for the recent (during June 2000 - June 2001) improvement (approximately $5,000 in costs incurred for construction of a fence) at the CPC facility. *See* Hearing Record Transcript at pp. 76, 84-85. Further, a July 5, 2000, facsimile to Jan H. Schutze, the then existing Chief Executive Officer (CEO) for OEC, from OEC's Refinery Division (otherwise

known as the CPC refinery located in Cyril, Oklahoma) evidenced OEC's knowledge and involvement concerning the payment of recurring expenses at the CPC facility. *See* Administrative Record at p. 00010. OEC also reported such maintenance of the CPC facility to the United States Securities and Exchange Commission. *See* Hearing Record Transcript Government Exhibit, Volume II, No. 4, at pp. 000042, 000049. These actions are consistent with interim status facility security and maintenance requirements at 40 C.F.R. §§ 265.14, 265.32, and 265.34;

5) Assumption of responsibility for hiring consultants, and other professionals to develop a cleanup plan, and hiring a CEO to develop a business plan utilizing the CPC facility for product storage, and production and distribution of hydrogen. *See* Hearing Record Transcript at pp. 45-50; Hearing Record Transcript Government Exhibits, Volume II, No. 4, at pp. 000021, 000025-000027, 000048-000049, and Volume II, No. 5 at p. 000057. Record evidence demonstrates Respondent OEC made the decision to hire Building Analytics as a consultant to prepare a storm water pollution prevention plan, and hired Jan H. Schutze as CEO to manage the conduct of a responsible

environmental cleanup at the CPC facility.[20] *See* Hearing Record Transcript at pp. 45-50. Mr. Schutze was also hired to plan and develop a product storage business, and commence hydrogen manufacturing and distribution at the CPC facility. Respondent OEC, with the vision of Mr. Schutze, "saw ... the possibility of using the [CPC] refinery again ... [and conducting] a responsible environmental cleanup." Hearing Record Transcript at p. 45. Clearly, the actions taken (hiring and use of environmental professionals) and planned by Respondent OEC were designed in part, to comply with the legal requirements of corrective action under RCRA Section 3008(h), and statutory and regulatory requirements under the Clean Water Act (CWA), 33 U.S.C. § 1342, and 40 C.F.R. § 122.26;

6) Assumption of responsibility for development of a cleanup plan and budget for the CPC facility. On August 24, 1999, Respondent OEC, with assistance of Mr. Val Henery and Ms. Meredith Sheets, developed a cleanup plan and budget on behalf of OEC for the CPC facility. *See* Hearing Record Transcript Government Exhibits, Volume II, No. 6, at pp. 000111-000112, and Volume II, No. 4, at pp. 000025-000027. Respondent OEC's most recent estimate of its environmental

[20] The consultant did in fact prepare a draft storm water pollution prevention plan. *See* Hearing Record Transcript at pp. 48-49.

cleanup for the CPC facility was approximately 2.5 to four (4) million dollars. *See* Hearing Record Transcript at p. 91; Hearing Record Transcript Government Exhibit, Volume II, No. 4, at p. 000027. Some of the actions included in Respondent OEC's plan and budget for a responsible environmental cleanup include the installation of process waste water, storm water and ground water treatment system, collection and disposal of hazardous waste, recovery of oil, the cleaning of storage tanks, bioremediation and disposal of hazardous waste in certain tanks, testing of electrical transformers for polychlorinated biphenyls (PCBs) and removal of asbestos. *See* Hearing Record Transcript Government Exhibit, Volume II, No. 6, at pp. 000111-000112. Once again, the planned and budgeted actions by Respondent OEC were intended to comply with the legal requirements of corrective action under RCRA Section 3008(h), statutory and regulatory requirements under Section 402 the Clean Water Act (CWA), 33 U.S.C. § 1342, and 40 C.F.R. § 122.26, regulatory requirements of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 et seq., found at 40 C.F.R. Part 761, Subparts A and D, and regulatory requirements of the Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., found at 40 C.F.R. Part 61, Supart M;

7) Assumption of responsibility to coordinate with appropriate regulatory authorities to obtain the necessary permits/authorizations to cleanup the CPC facility, commence product storage operations, and recommence manufacturing operations at the facility. *See* Hearing Record Transcript at pp. 45, 48-50; Hearing Record Transcript Government Exhibits, Volume II, No. 6, at pp. 000111-000112, and Volume II, No. 4, at pp. 000021-000022, 000026-000027, 000042, 000049. Respondent OEC conferred with EPA officials on several occasions (during the year 2000) with the goal of securing the necessary authorizations to cleanup the CPC facility, commence storage operations and recommence manufacturing operations. *See* Hearing Record Transcript at pp. 45, 48-49, 51; Hearing Record Transcript Government Exhibits, Volume II, No. 6, at pp. 000111-000112, Volume II, No. 4, at pp. 000021, 000027, 000049, and Volume II, No. 5 at p. 000057. Respondent OEC's efforts described above are consistent with the legal requirements of RCRA Sections 3005, and 3008(h), interim status facility regulatory requirements under 40 C.F.R. § 265 et seq., and statutory and regulatory requirements under Section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342, and 40 C.F.R. § 122.26; and

8) Assumption of responsibility to pursue additional financing during the year 2000, for recommencement of CPC refinery operations. *See* Hearing Record Transcript Government Exhibits, Volume II, No. 5 at p. 000058, and Volume II, No. 4, at pp. 000025, 000042, 000048. Under interim status facility requirements, any given facility must satisfy the financial assurance requirements under 40 C.F.R. § 265.140 et seq. Without satisfying the above requirements, the CPC facility could not lawfully recommence manufacturing operations. As a result, OEC's actions were in part, consistent with federal regulatory compliance requirements.

In light of the above findings, Respondent OEC is the current "operator," responsible for the management, direction or conduct of operations specifically related to the storage, leakage and disposal of hazardous waste, and decisions concerning compliance with environmental regulations. *See* United States v. Bestfoods, 524 U.S. 51, 52 (1998). Record evidence clearly demonstrates that Respondent OEC controls access to the CPC facility, controls the stored hazardous waste at the facility, and engaged in activities designed to comply with environmental laws and regulations. Respondent OEC also planned and budgeted the conduct of necessary corrective action under RCRA Section 3008(h), and sought

authorizations from EPA to commence storage and manufacturing activities at the CPC facility. Due to the facts found and conclusions made above, this tribunal holds Respondent OEC liable as the current "operator" under 40 C.F.R. § 260.10 and RCRA Section 3008(h).

AUTHORIZED TO OPERATE UNDER SECTION 3005(e)

Under RCRA Section 3005(e), owners and operators of facilities in operation before November 19, 1980, are required to timely notify EPA of its hazardous waste operations, and apply for a permit (Part A application) before operations continue under interim status.[21] Thereafter, a timely Part B application must be filed in order to retain interim status while awaiting a final permit decision. Interim status is also terminated by issuance of a final permit decision, or a facility's failure to comply with interim status requirements. *See* 40 C.F.R. § 270.72 and 270.73.

Record evidence shows on June 27, 1980, the Oklahoma Refining Company (ORC) submitted a notice of hazardous waste activity to EPA under RCRA Section 3010(a), 42 U.S.C. § 6930(a). The notice addressed its petroleum manufacturing facility located in Cyril, Oklahoma (currently known as the

[21] Consistent with information provided earlier, the CPC facility commenced operations in approximately 1919, and operated under various names since that time.

CPC facility). *See* Administrative Record at pp. 01244-01245. On May 28, 1981, ORC submitted an EPA Form 3 - RCRA Part A permit application to EPA Region 6. *See* Administrative Record at pp. 01249-01253. Thereafter, ORC submitted a Form 1 - RCRA Part A application to EPA on November 8, 1982. *See* Administrative Record at pp. 01262-01264. As a result of ORC's compliance with RCRA Section 3005(e), it obtained interim status to operate the Cyril facility engaged in hazardous waste management activity. *See* Hearing Record Transcript at p. 19. However, interim status did not continue with the successive owner and operator discussed below.

As it concerns the same Cyril, Oklahoma, facility discussed above, CPC submitted a notification of hazardous waste activity to EPA on July 20, 1988. *See* Administrative Record at pp. 01304-01307. This particular notification identified the CPC facility as a generator of D000, K038, K049, K050, and K051 hazardous waste. It also identified CPC as the legal owner of the Cyril, Oklahoma, facility. On June 22, 1993, CPC submitted another hazardous waste activity notification to EPA. This notification noted the facility's change in legal ownership from CPC to Caymen Resources

Corporation.[22] *See* Administrative Record at pp. 01336-01337. The 1993 notification of hazardous waste activity also identified CPC as a generator of K052. No other hazardous waste activity was noted at the CPC facility. *See* Administrative Record at pp. 01304-01307, 01336-01337. The CPC facility engaged in hazardous waste management activity (including management and storage of K052, FO37, and D004 hazardous waste) other than the generation of D000, K038, K049, K050, K051, and KO52 hazardous waste after 1993. As such, interim status was not obtained due to CPC's (the legal "owner" of the facility) failure to notice the hazardous waste

[22] But note reliable and credible record information, including an admission by EPA and Respondent OEC, a purchase contract, a bill of sale and a loan agreement attached to a journal entry of judgment, demonstrate there is no legitimate dispute by any of the parties that CPC is the owner of the storage and management facility (the real property and attached structures). *See* Administrative Record at pp. 01280-01281, 01299-01303; Hearing Record Transcript at pp. 15-16; Hearing Record Transcript Government Exhibit, Volume 1, No. 6, at. p. 000039. As such, it appears Respondent OEC (the legal successor to Caymen Resources Corporation due to a June 11, 1997, name change) confused legal ownership of CPC's stock with ownership of the CPC facility. OEC owned CPC's stock prior to Respondent Rayll's acquisition of CPC's stock on July 28, 1997. *See* Hearing Record Transcript Government Exhibits, Volume I, No. 1, and Volume II, No. 4, at p. 000042; Administrative Record at pp. 00002-00009. In 1991, OEC (formerly named Cayman Resources Corporation) purchased CPC's stock with the intent of reopening the refinery for operations. *See* Administrative Record at. p. 00238.

storage and management activity described above. [23] Interim status was also not obtained due to CPC's failure to submit a Part A application. *See* 40 C.F.R. §§ 265.1, and 270.70. As a result, interim status did not continue under CPC's ownership of the CPC facility.

The hearing record is void of Respondent OEC's (the "operator" of the CPC facility) submission of the required RCRA Section 3010(a) notification. In addition to failing to notify EPA of its hazardous waste management and storage operations, Respondent OEC failed to submit a Part A application. Indeed, Respondent OEC did not qualify for interim status under RCRA Section 3005(e). *See* 40 C.F.R. §§ 265.1, and 270.70. Accordingly, interim status did not continue under OEC's operation of the facility.

Notwithstanding the fact that Respondents CPC and OEC failed to qualify for interim status under RCRA 3005(e), corrective action under 3008(h) applies. Corrective action

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[23] An EPA inspection in June 1998 found storage violations (storage of F037, K052 and D004 waste) at the CPC facility. *See* Administrative Record at p. 00225; Hearing Record Transcript at pp. 22-23. As a result, the Agency characterized the CPC facility as an unregulated and inoperable treatment, storage and disposal facility currently storing hazardous waste without a permit. *See* Hearing Record Transcript Government Exhibit, Volume I, No. 2, at p. 2. The interim measures included the IAO seek to address the hazardous waste storage issues.

requirements apply to hazardous waste management facilities whether or not interim status was obtained by the owners and operators. Otherwise, such facilities and owners and operators of these facilities, could gain an exemption from the obligation to perform corrective action by failing to submit the required information necessary to obtain interim status. *See* United States v. Indiana Woodtreating Corp., 686 F.Supp. 218, 223-224 (S.D. Ind. 1988). To allow such an exemption would undermine congressional intent and be contrary to EPA's interpretation of its corrective action authority. *See* Hearing Record Transcript Government Exhibit, Volume I, No. 9, at pp. 000067-000068; United States v. Indiana Woodtreating Corp., 686 F.Supp. 218, 223-224 (S.D. Ind. 1988).

Owners and operators of hazardous waste management facilities in existence before November 19, 1980, are also required to comply with interim status standards found at 40 C.F.R. Part 265, even though interim status is never achieved. *See* 40 C.F.R. § 265.1(b). Notwithstanding, the Respondents failed to present interim status arguments during this RCRA Section 3008(h) adjudicatory proceeding. Hence, the Respondents forfeited their respective rights to raise material issues consistent with the procedures provided at 40 C.F.R. §§ 24.05, 24.17(a), and there is no material case or

controversy related to interim status. *See* Powell v. McCormack, 395 U.S. 486, 496, N. 7 (1969). Accordingly, this tribunal respectfully finds that record evidence supports issuance of the IAO to the Respondents liable for the conduct of corrective action under RCRA Section 3008(h).

CORRECTIVE ACTION OR SUCH OTHER RESPONSE NECESSARY TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT

The investigation and cleanup of hazardous waste at facilities subject to RCRA Section 3005(e) constitute corrective action under Section 3008(h). *See* 42 U.S.C. §§ 6928(h). Based upon record evidence noted previously, there were releases of hazardous waste and constituents to the surface soils, sub-surface soils, surface water and groundwater at the CPC facility. It is not necessary for a catastrophic event to occur, such as someone drinking contaminated groundwater, before correction action is either ordered or taken. *See* U.S. EPA v. Environmental Waste Control Inc., 710 F.Supp. 1172, 1241 (N.D. Ind. 1989). The hazardous waste and constituents identified herein (e.g., lead and arsenic) exhibit toxic, carcinogenic, mutagenic or teratogenic effects on humans and other life forms. *See* 40 C.F.R. § 261.11(a)(3); Administrative Record at pp. 01670-01673, 01674-01677, 01681-01685, 01695-01698, 01742-01747, 01856-01858,

01915-01919, 01958-01961, 01978-01982, 01992-01994, 02051-02054, 02101-02105. Indeed, the potential threat to human health and the environment presented by the CPC facility requires corrective action.

Here, the corrective action specified in the IAO includes performance of the following:

1) Interim Measures (IM) - The submission of an IM Workplan within 150 days from the effective date of the final Corrective Action Order; the conduct of necessary action to remove, stabilize, correct and/or dispose of asbestos containing material at the facility; the conduct of necessary action to remove, stabilize, correct and/or dispose of solids generated from commingled storm and process waste water management; and the conduct of necessary action to remove, stabilize, correct and/or dispose of leaded tank bottoms, arsenic contaminated water, and PCB transformers containing oil;

2) RCRA Facility Investigation (RFI) - This investigation encompasses the submission of a current conditions report within 180 days from the effective date of the final Corrective Action Order; the submission of an RFI Workplan within 210 days from the effective date of the Corrective Action Order; the submission of an RFI Report

within 540 days of EPA's approval of the RFI Workplan; and the submission of a Risk Assessment within 90 days of the submission of the RFI Report;

3) Corrective Measures Study (CMS) - As provided in the IAO, EPA requires submission of a CMS study 120 days after approval of the RFI Report; and

4) Corrective Measures Implementation (CMI) - Within 120 days after EPA notifies the Respondents of the corrective action selected by EPA, the Respondents are required to submit a CMI Plan including a Project Schedule; and the Respondents are also required to conduct the corrective action work in accordance with the CMI Plan Scope of Work. *See* Administrative Record, IAO.

Because the Respondents did not raise any material issues regarding necessary response measures/corrective action during this RCRA Section 3008(h) corrective action proceeding, they forfeited any right to contest the corrective action included in the IAO. *See* 40 C.F.R. §§ 24.05, 24.17(a). As such, the Respondents failed to present a case or controversy regarding the corrective action deemed necessary to protect human health and the environment. *See* Powell v. McCormack, 395 U.S. 486, 496, N. 7 (1969). This tribunal respectfully finds the

corrective action included in the IAO is necessary to protect human health and the environment.

SPECIFICITY OF THE INITIAL ORDER

RCRA Section 3008(h)(2) requires the IAO in question to "state with reasonable specificity the nature of the required corrective action ... and a time for compliance." The work to be performed section of the IAO and the attached corrective action plan (CAP), serve as starting point in reviewing the specificity and time allowed for the corrective action required in the IAO. Consistent with corrective action work outlined previously, the IM, RFI, CMS and CMI provide a reasonable level of specificity concerning the nature of the corrective action required, and the time for compliance. Upon review of the CAP attached to the IAO, EPA included substantial detail concerning the corrective action work (IM, RFI, CMS and CMI) and project schedules for completion of such work. *See* Administrative Record, IAO.

When determining the reasonableness of the specific nature for corrective action required in the IAO, and the time allowed for compliance, consideration must be given to the fact that statutes such as RCRA enjoy liberal interpretation to effectuate their underlying remedial goals. *See* U.S. v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir.

1989). RCRA Section 3008(h) authorized EPA to require the investigation and cleanup of hazardous waste or constituents released into the environment from facilities without a RCRA permit, but subject to interim status. Such authority provided a means to avoid delays associated with corrective action subject to the permitting process under RCRA. *See* 42 U.S.C. §§ 6924(u), (v) and 6928(h); H.R. Conf. Rep. No. 98-1133, 98th Cong., 2d Sess. 110-112 (1984).

In light of the details provided in the IAO and the CAP, and the remedial purpose of RCRA Section 3008(h), this tribunal rejects Respondent Rayll's arguments concerning the specificity of the corrective action included in the IAO and the time specified for compliance. Respondent Rayll's arguments are neither supported by record evidence, nor persuasive.[24] As to all other matters raised, they were considered and found either immaterial, not properly raised

[24] Respondent Rayll's arguments include the failure of EPA to notify him of the required cleanup of the CPC facility, the need for additional time to formulate a cleanup plan and the need for additional time to find a buyer willing to cleanup the facility. Nevertheless, record evidence shows on November 6, 2000, Respondent Rayll requested a hearing concerning the October 6, 2000, IAO served on him. The remaining time-related arguments are either immaterial pursuant to 40 C.F.R. § 24.17(a), or not substantiated by record evidence and legal argument citing persuasive authorities/precedent.

under 40 C.F.R. §§ 24.05 and 24.17(a), or unpersuasive in light of 40 C.F.R. § 24.17(a).

IV. CORRECTIVE ACTION BASIS AND POST-RECOMMENDATION PROCESS

REQUIRED ELEMENTS TO SUPPORT ISSUANCE OF THE IAO

Although there is no question concerning Respondent CPC's liability as any right to a hearing was waived, the preponderance of evidence, including the findings made herein, demonstrates Respondent CPC is the current "owner" of the CPC facility. Preponderant evidence also shows Respondent OEC is the current "operator" of a CPC facility. The CPC facility, the owner and operator of such facility, are subject to interim status requirements. Hazardous waste and hazardous constituents were released into the environment at the CPC facility. Reliable and credible record evidence also shows corrective measures selected by EPA and included in the IAO, are both reasonably specific and necessary to protect human health and the environment.

PARTIES RIGHT TO COMMENT

Both EPA and the Respondents possess the ability to influence the outcome of the final decision. This tribunal only recommends a decision to the Regional Administrator, and the parties have the opportunity to file comments concerning this Recommended Decision within twenty-one (21) days of

service of the recommendation. *See* 40 C.F.R. § 24.17. As such, the parties are once again informed of their immediate post-hearing rights afforded by regulation.

V. RECOMMENDATION

This tribunal reviewed all oral and written information made part of the record, including presentations by each party present at the June 20, 2001, public hearing. As a result, the following modifications to the IAO are necessary:

1) Modification to IAO - The caption of the case shall be modified to remove John A. Rayll, Jr., as a Respondent. Based on record evidence, OEC and CPC only, shall be named as Respondents; and

2) Modification to IAO - Section IV (Findings of Fact), Page 2, Paragraph 1. All references to "Mr. John A. Rayll, Jr." as a named "Respondent" shall be removed.[25]

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[25] In addition, 40 C.F.R. § 24.17(a) requires this tribunal to evaluate and make recommendations concerning contested matters not supported by the preponderance of record evidence. Because the Respondents failed to contest the amount of acreage owned by CPC, this tribunal is not recommending a change to Section IV (Findings of Fact), Page 2, Paragraph 3a, despite conflicting record evidence. Note however, reliable documentary evidence identifies CPC as the owner of the northern portion of the CPC refinery situated on approximately 106 acres. *See* Hearing Record Transcript Government Exhibit, Volume I, No. 6, at p. 000039. Meanwhile, the parties and the IAO state the facility owned by Respondent CPC encompasses 134 acres. *See* Hearing Record Transcript at pp. 15-16, 41-42, 52. Hence, this tribunal respectfully requests inclusion of the accurate acreage owned by CPC in any

SO RECOMMENDED, this 3RD day of October 2001.

//s//
GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

Final Order issued under RCRA Section 3008(h).

In the Matter of Cyril Petrochemical Corp., and et al., Respondents, Docket No. RCRA VI-001(h)-00-H.

CERTIFICATE OF SERVICE

I, Lorena Vaughn, Regional Hearing Clerk for the Region 6, U.S. Environmental Protection Agency located in Dallas, Texas, hereby certify that I served true and correct copies of the foregoing Recommended Decision dated October 3, 2001, on the persons listed below, in the manner and date indicated:

Mr. John A. Rayll, Jr. 1701 South St. Louis Ave. Apt. #2 Tulsa, Oklahoma 74120-7218	U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED
Mr. Kelly W. Bixby, Esq. Bixby & Associates 10530 Wilshire Boulevard Suite 508 Los Angeles, California 90024	U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED
Ms. Cheryl Boyd, Senior Esq. U.S. EPA, Region 6 (6RC-EW) 1445 Ross Avenue Dallas, Texas 75202-2733	HAND DELIVERY

Date :

_____

Lorena Vaughn
Regional Hearing Clerk