IN RE MARINE SHALE PROCESSORS, INC.

RCRA Appeal No. 94-12

FINAL DECISION AND ORDER

Decided March 17, 1995

Syllabus

By petition dated October 20, 1994, Marine Shale Processors, Inc. ("MSP") requested that the Environmental Appeals Board review the decision of Region VI denying MSP's application for a RCRA permit for MSP's facility in Amelia, Louisiana. MSP had sought a permit to operate as an industrial furnace under the Boilers and Industrial Furnace ("BIF") Rule. 40 C.F.R. Part 266 (Subpart H); 56 Fed. Reg. 7134 (February 21, 1991). By order dated December 7, 1994, the Board granted MSP's petition for review and scheduled oral argument. Oral argument was held on January 12, 1995.

MSP's facility consists of, among other things, a rotary kiln, two hazardous waste-fired oxidizers, a "slag box," a baghouse, and an emissions stack. The facility receives and burns hazardous waste from a large variety of sources and, according to MSP, produces a useful product from these wastes, which MSP calls "aggregate." According to MSP, this "aggregate" is the result of a patented manufacturing process that uses thermal treatment to accomplish the recovery of materials or energy. In addition, MSP asserts that its "aggregate" constitutes a legitimate product which can be sold to interested parties for a variety of uses. MSP asserts that, as an aggregate kiln, it meets the definition of an industrial furnace at 40 C.F.R. § 260.10 and is therefore entitled to a BIF permit. Thus, although MSP has operated the facility since July 1985, MSP claims that it was exempt from obtaining an incineration permit for its kiln until 1991 and promulgation of the BIF rule.

Prior to August 21, 1991, the date on which the BIF rule became effective, combustion facilities, such as aggregate kilns, that were engaged in legitimate recycling operations were exempt from federal RCRA regulations governing the incineration of hazardous waste for destruction set forth in 40 C.F.R. Part 264, Subpart O. MSP has asserted that, as an aggregate kiln it was not incinerating wastes for destruction but was an industrial furnace engaged in legitimate recycling, and thus exempt from Part 264. The pre-BIF regulations, however, did not specify which activities by so-called industrial furnaces constituted legitimate recycling rather than incineration for purposes of waste destruction. The Agency therefore developed certain criteria to determine whether a facility was burning hazardous waste for destruction, and was therefore subject to regulation as an incinerator under 40 C.F.R. Part 264 Subpart O, or was engaged in legitimate recycling and therefore exempt from the standards applicable to incinerators. These criteria are referred to by the Agency as the "sham recycling criteria." Among the factors the Agency considered relevant in determining whether a facility was a sham or a legitimate recycler were: 1) whether a hazardous waste was ineffective or only marginally effective for the claimed use; 2) whether a hazardous waste was used in excess of the amount necessary to make a product; 3) whether the material burned was as effective as the material it was replacing; 4) whether sufficient records were kept documenting recy-

cling transactions; 5) whether materials were stored and handled in a manner consistent with their use as raw materials or commercial product substitutes; 6) whether wastes were solicited and accepted indiscriminately; and 7) whether the hazardous waste had little or no energy value. With promulgation of the BIF rule in 1991, however, all facilities burning hazardous waste, including aggregate kilns engaged in legitimate recycling, are now subject to regulation.

Region VI denied MSP's BIF permit application on several grounds. First, utilizing the sham recycling criteria, the Region concluded that MSP's rotary kiln and associated equipment are not integral components of an aggregate manufacturing process. Thus, according to the Region, MSP is subject to regulation as an incinerator rather than as a BIF. The Region also considered whether the facility produced an effective commercial-grade aggregate useful to industries who generally purchase such products. The Region stated that in order to make this determination the material exiting MSP's facility was tested by experts retained by the Agency as well as the Louisiana Department of Transportation and Development ("La. DOTD") and compared to aggregate commonly accepted by the construction industry. The La. DOTD concluded that the material did not meet applicable requirements for use in road and bridge construction in the State of Louisiana. In addition, Agency experts concluded that MSP's material could not be considered "aggregate" from a civil engineering perspective. Second, the Region concluded that MSP's oxidizer units are themselves incinerators, and MSP was therefore required to obtain an incinerator permit even if MSP was otherwise engaged in a manufacturing process. Finally, the Region asserted that under the "omnibus" authority of RCRA § 3005(c)(3), MSP's prior history of non-compliance with various environmental statutes and regulations justified the permit denial.

MSP makes the following arguments challenging the Region's determination: 1) the BIF permit denial violated MSP's constitutional right to due process because the permit application was reviewed and decided upon by biased decisionmakers who had prejudged adjudicative factual and legal issues relating to the application; 2) under the separation of powers doctrine, the Board should defer to the rulings of the Federal District Court for the Western District of Louisiana in a related enforcement action brought by the Agency and stay the current permit proceedings pending the final outcome of that action; 3) under the seventh amendment to the United States Constitution, the Board may not rule on factual issues delegated to the jury in the enforcement action; 4) the Board is collaterally estopped from redeciding issues previously decided by the district court; 5) the Agency's reliance on the sham recycling criteria was clearly erroneous and violates the Administrative Procedure Act; 6) the Region's determination that MSP is not a legitimate recycler was clearly erroneous and based upon an incomplete review of the administrative record; 7) the Region's conclusion that MSP's facility does not meet the definition of an industrial furnace is clearly erroneous and impermissibly disregards the jury's findings and the district court's rulings in the enforcement action; 8) MSP's aggregate is a legitimate product within the meaning of 40 C.F.R. § 266.20; and 9) the Region may not deny the permit application based on the Region's conclusions regarding MSP's prior regulatory history.

Held: The Board concludes that there is more than adequate evidence in the record to support the Region's conclusion that MSP's facility does not function as an "aggregate kiln" within the meaning of 40 C.F.R. § 260.10 and thus does not meet the definition of industrial furnace. In particular, analyses of the material produced by MSP indicate that it is not of sufficient quality and consistency to be considered commercial-grade aggregate that is useful to industries that regularly purchase that product. An analysis of MSP's material by experts retained by the Agency as well as the Louisiana Department of Transportation and Development support the conclusion that the material is not a commercially useful aggregate. Although MSP presented evidence to show that some portion of the more than 200 thousand tons of material it produces may be useful and marketable as fill material, and possesses some of the attributes of aggregate, it did not present any evidence to show that its product has ever been used in any substantial quantities as aggregate by anyone in the

construction industry. In such circumstances, the Board finds that the Region correctly concluded that MSP's facility is not an industrial furnace within the meaning of 40 C.F.R. § 260.10.

In addition, MSP has not presented the Board with any legal basis for rejecting the Region's determination. The Board concludes that it is not collaterally estopped by the jury's answers to interrogatories in the civil enforcement proceeding from concluding that MSP's facility is not an industrial furnace. In addition, the Board finds that neither the Seventh Amendment nor separation of powers principles preclude the Board from acting on MSP's permit application. Finally, after a careful review of the record the Board does not believe that MSP's allegations of bias warrant a reversal of the Region's permit denial.

The Region's denial of the BIF permit application is therefore affirmed and this matter is remanded so that the Region can issue a final permit denial.

Before Environmental Appeals Judges Nancy B. Firestone and Ronald L. McCallum.[1]

Opinion of the Board by Judge McCallum:

Before us is a petition for review of U.S. EPA Region VI's decision to deny a Part B application submitted by Marine Shale Processors, Inc. ("MSP") in April of 1992 for a permit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*, for MSP's facility located in Amelia, Louisiana. *See Petition for Marine Shale Processors, Inc. for Review of BIF Permit Denial* ("Petition"). MSP had sought a permit to operate as an industrial furnace under the Boilers and Industrial Furnace ("BIF") Rule. 40 C.F.R. § 270.66; 56 Fed. Reg. 7134 (Feb. 21, 1991). Although the State of Louisiana has been authorized under section 3006 of RCRA, 42 U.S.C. § 6926, to administer certain aspects of the RCRA program in lieu of the federal program, MSP's permit application was handled by EPA in this case because Louisiana has not yet been authorized to implement the BIF rule. By order dated December 7, 1994, the Board granted MSP's petition for review and scheduled oral argument. Oral argument was held on January 12, 1995.

I. *BACKGROUND*

MSP's facility consists of, among other things, a rotary kiln, two hazardous waste-fired oxidizers (referred to by the parties as oxidizers number 1 and number 2), a "slag box," a baghouse, and an emissions stack. The facility receives and burns hazardous waste from a large variety of sources, and, according to MSP, produces a useful "aggregate" from these wastes for use as fill material and in asphaltic mixtures, among other things.

[1] Environmental Appeals Judge Edward E. Reich did not participate in this decision.

Waste materials are initially fed into the rotary kiln and burned at temperatures ranging from 1600 to 2500 degrees Fahrenheit. *Statement of Basis for Proposed Denial of Permit Application by Marine Shale Processors, Inc.* at 4 (January 31, 1994). After exiting the kiln, the metals concentration of the remaining ash material, referred to by MSP as "primary aggregate," is tested to determine whether it contains metal concentrations exceeding applicable land disposal restrictions.[2] *Id.* MSP frequently places ash material that fails to meet applicable land disposal treatment standards into the oxidizers where many of the materials melt and flow into the "slag box." *Id.* The molten material is then cooled by dropping the material into a water "quench," producing a black, glassy material referred to by MSP as "slagged aggregate." *Id.* MSP refers to this process as "slagging" or "vitrification." *Id.*

Although MSP has operated the facility since July of 1985, it did not seek a RCRA operating permit for its combustion activities until after promulgation of the BIF rule in 1991. Prior to August 21, 1991, the date on which the BIF rule became effective, MSP contended that it was a legitimate recycler engaged in the production of "aggregate" and therefore exempt from RCRA's waste incineration regulations, 40 C.F.R. Part 264 Subpart O. More specifically, MSP contended, as it still contends, that it is an "aggregate kiln" engaged in legitimately recycling hazardous waste into aggregate, and thus it is an industrial furnace under 40 C.F.R. § 260.10[3] and not an incinerator destroying hazardous wastes. We note that the pre-BIF regulations, however, did not specify which activities constituted legitimate recycling rather than incineration. The Agency therefore developed certain criteria to determine whether a facility was burning hazardous waste for destruction, and was therefore subject to regulation as an incinerator under 40 C.F.R. Part 264 Subpart O, or was an industrial furnace engaged in legitimate recycling and therefore exempt from the standards applicable to incinerators. These criteria are referred to by the Agency as the "sham recycling criteria." *See* 50 Fed. Reg. 638 (January 4, 1985); Memorandum from Lisa K. Friedman, Associate General Counsel, Solid Waste and Emergency Response Division, to Administrative Record for Marine Shale Permit Decision, dated August 8, 1994 (Responding to MSP on Issues Relating to Use of EPA's Sham Recycling Criteria), Administrative Record (AR), Exh. E-6. Among the factors the Agency considered relevant in determining whether a facility was a sham or a legitimate recycler were: 1) whether a hazardous waste was ineffective or only marginally effective for the claimed use; 2) whether a hazardous waste was used in excess of the amount necessary to make a product;

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[2] *See generally* 40 C.F.R. Part 268 (Land Disposal Restrictions).

[3] *See infra* note 5.

3) whether the material burned was as effective as the material it was replacing; 4) whether sufficient records were kept documenting recycling transactions; 5) whether materials were stored and handled in a manner consistent with their use as raw materials or commercial product substitutes; 6) whether wastes were solicited and accepted indiscriminately; and 7) whether the hazardous waste had little or no energy value. With promulgation of the BIF rule in 1991, however, all combustion units listed in 40 C.F.R. § 260.10, including aggregate kilns engaged in legitimate recycling, are now subject to specific permit requirements. In fact, facilities falling within the definition of a BIF are subject to more stringent requirements than are those facilities regulated as incinerators. *See* 56 Fed. Reg. 7,188 (February 21, 1991).

In May of 1991, MSP submitted its Part A permit application for the purpose of obtaining interim status as a BIF. *See infra,* note 46 and accompanying text. In April of 1992, at the Region's request, MSP submitted a six-volume Part B application for a BIF permit to Region VI pursuant to 40 C.F.R. Part 266. *See id.* According to MSP, the so-called aggregate it produces is the result of a patented manufacturing process that uses thermal treatment to accomplish the recovery of materials or energy. In addition, MSP asserted that this aggregate constitutes a legitimate product which can then be sold to interested parties for a variety of uses.[4] MSP concludes that its facility is an "aggregate kiln" and therefore meets the definition of industrial furnace at 40 C.F.R. § 260.10.[5] Thus, MSP asserts that it is entitled to a BIF permit.

[4] Pursuant to an order issued by the Louisiana Department of Environmental Quality (LDEQ), MSP has not sold any of its material to the general public since May 26, 1989. *See* Administrative Record (AR) Exh. A-25. Citing concerns over whether MSP's material met applicable land disposal treatment requirements at 40 C.F.R. Part 268, LDEQ forbad MSP from removing any of this material from MSP's premises. Pursuant to a court order dated August 2, 1991, issued by the United States District Court for the Western District of Louisiana, MSP has been permitted to sell its material only for use in the development of an industrial park in the vicinity of MSP's plant owned by Recycling Park, Inc. (RPI). RPI is a "sister corporation" of MSP's that owns 200 acres of property near the facility. *See Corrected Response of United States Environmental Protection Agency to petition of Marine Shale Processors,* ("Region's Response") at 3.

[5] The industrial furnace definition reads as follows:

> *Industrial furnace* means any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy:
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> (1) Cement kilns
>
> (2) Lime kilns
>
> (3) Aggregate kilns
>
> (4) Phosphate kilns

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A. *BIF Permit Denial*

On January 31, 1994, the Region proposed to deny MSP's BIF permit application on several grounds. *See Statement of Basis for Proposed Denial of Permit Application by Marine Shale Processors, Inc.* ("Proposed Denial"). The primary basis for the proposed denial was the Region's conclusion that "MSP does not meet the definition of an aggregate kiln and, therefore, does not meet the definition of industrial furnace as stated in 40 C.F.R. § 260.10." Proposed Denial at 1

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(5) Coke ovens

(6) Blast furnaces

(7) Smelting, melting and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machine[s], roasters, and foundry furnaces)

(8) Titanium dioxide chloride process oxidation reactors

(9) Methane reforming furnaces

(10) Pulping liquor recovery furnaces

(11) Combustion devices used in the recovery of sulfur values from spent sulfuric acid

(12) Halogen acid furnaces (HAFs) for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as-generated.

(13) Such other devices as the Administrator may, after notice and comment, add to this list on the basis of one or more of the following factors:

(i) The design and use of the device primarily to accomplish recovery of material products;

(ii) The use of the device to burn or reduce raw materials to make a material product;

(iii) The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;

(iv) The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;

(v) The use of the device in common industrial practice to produce a material product; and

(vi) Other factors, as appropriate.

40 C.F.R. § 260.10.

(footnote omitted). According to the Region, MSP's facility functions not as an industrial furnace but as a commercial incinerator and therefore is subject to the incinerator rather than the BIF regulations. Proposed Denial at 10. The Region further stated that, pursuant to 40 C.F.R. § 260.10, the essential attribute of an industrial furnace "is to be an integral component of a manufacturing process." *Id.* Utilizing the sham recycling criteria discussed above, the Region concluded that, contrary to MSP's assertion, MSP does not operate an aggregate kiln because MSP's rotary kiln and associated equipment are not integral components of a manufacturing process.[6] The Region also concluded that the output from MSP's facility does not qualify as a recycled material or meet the requirements for a recycled product at 40 C.F.R. § 266.20. Thus, according to the Region, the facility does not meet the definition of an "industrial furnace" at Section 260.10. *Id.* at 10-11.

The proposed denial was also based on the Region's belief that MSP's oxidizer units are themselves used to incinerate hazardous waste and cannot be classified as industrial furnaces under Section 260.10. Thus, according to the Region, "[e]ven if MSP's arguments that it is engaged in manufacturing a product are taken as true and the oxidizers are considered to be 'integral components of [a] manufacturing process,'" the facility was still required to obtain an incinerator permit. *Id* at 27-28 (brackets in original). Finally, the Region asserted that under the "omnibus" authority of RCRA § 3005(c)(3), even if MSP were otherwise entitled to a BIF permit, the Region properly denied the permit application based on MSP's prior history of non-compliance with various federal and State environmental regulations. *Id.* at 28.

During the comment period on the Proposed Denial, MSP submitted a two-page letter charging that the Agency had applied "result-oriented" and "urged for" interpretations of the applicable regulations in an attempt to "purposely drive MSP out of business." *See* Letter from

[6] Upon application of the sham recycling criteria, the Region concluded that: (1) MSP has burned, and continues to burn, large volumes of hazardous wastes that have no recycling value: (2) MSP's material is not useful by industries that use aggregate and is not a marketable aggregate product; (3) MSP is using hazardous waste in excess of what it would need if it were merely using the hazardous waste to produce aggregate; (4) The hazardous waste used by MSP is not as effective for producing aggregate as the raw materials normally used to produce aggregate; (5) There is an enormous disparity between the revenues that MSP receives from accepting hazardous waste from generators and the insignificant revenues it receives from selling its aggregate; (6) MSP accepts hazardous wastes indiscriminately without regard for how those wastes might affect the quality of its output; (7) The hazardous constituents in the wastes used by MSP do not contribute any valuable qualities to MSP's output, suggesting that the hazardous constituents are merely being burned for destruction; (8) MSP does not keep adequate records documenting the disposition of its output; (9) There is a strong similarity between MSP's operating practices and those of a commercial hazardous waste incinerator; and (10) MSP cannot demonstrate a known market or disposition for its "aggregate." Denial at 9-36.

George Badge Eldredge, Vice President and General Counsel of MSP, to Allyn M. Davis, Director, Region VI Hazardous Waste Management Division, at 1 (June 30, 1994). The letter also stated that many of the grounds for the proposed denial "have already been obviated by the jury's findings and the judge's rulings" in a related enforcement proceeding in the Federal District Court for the Western District of Louisiana. *Id.* at 2. Along with this letter, MSP submitted eighteen boxes of documents which it stated "demonstrate that the company should be granted a BIF permit." *Id.* According to Region VI, this amounted to approximately 80,500 pages of documents. *See The Environmental Protection Agency's Expedited Motion to Deny Review*, at 6 (Nov. 4, 1994). MSP's letter did not specifically identify any issues raised by these documents, nor did it reference any specific issues raised in the Proposed Denial. The Region did, however, "in its discretion chose to interpret MSP's submissions and respond as best it could." *Id. See* Response to Comments, AR Exh. E-17.

The Region issued a final decision denying MSP's BIF permit application on September 15, 1994. *See Statement of Basis for Denial of Permit Application by Marine Shale Processors, Inc.* ("Denial"). In the Denial, the Region essentially adopted the rationale articulated in the Proposed Denial, i.e., MSP's facility is not an "aggregate kiln" and therefore does not meet the definition of "industrial furnace" at 40 C.F.R. § 260.10, the facility's output does not meet the definition of recycled materials or the requirements for a recycled product, the oxidizer units are themselves incinerators and are therefore subject to regulation as incinerators, and, under the Agency's omnibus authority, the permit was properly denied because of MSP's prior history of noncompliance with various environment regulations. Denial at 1.

In analyzing whether or not MSP's facility could be considered an aggregate kiln, one of the 12 devices specifically identified as industrial furnaces at Section 260.10, the Region considered, *inter alia*, whether the facility produced an effective commercial-grade aggregate useful to industries which generally purchase such products. *See* Denial at 13 ("The issue here is whether the hazardous wastes used by MSP produce an effective, usable 'aggregate' or whether the hazardous wastes produce ineffective or marginally effective 'aggregate.'"). The Region stated that the material exiting MSP's facility was tested by experts retained by the Agency as well as the Louisiana Department of Transportation and Development ("La. DOTD") and compared to other material commonly accepted by industry. *Id.* As discussed more fully below, the La. DOTD concluded that the material did not meet applicable requirements for use in road and bridge construction in the Sate of Louisiana. In addition, Agency experts concluded that MSP does not

produce a marketable aggregate product. The Region relied on the fact that MSP never established a market for its material as a commercial-grade aggregate, despite the fact that MSP had produced over 200 thousand tons of this material and that between 1985 and 1989 MSP was free to sell the material to the construction industry. The Region concluded, based on these and other factors, that MSP's facility did not meet the definition of "industrial furnace" at 40 C.F.R. § 260.10. This appeal followed.

B. *District Court Proceedings*

In June of 1990, prior to promulgation of the BIF rules, the Agency initiated a civil enforcement proceeding in the United States District Court for the Western District of Louisiana alleging, among other things, that MSP's combustion of hazardous waste since it began operating in 1985 constituted incineration rather than legitimate recycling. Thus, according to the Agency, MSP was required under the regulations governing the incineration of hazardous waste to obtain an incinerator permit before it began operating.

Southern Wood Piedmont Company (SWP) filed a complaint in intervention in the district court proceeding, alleging that SWP delivered certain materials (mostly soils contaminated with organic wood preserving substances such as creosote) to MSP and that MSP processed this material separately from material received from other sources. In Count 1 of its complaint, SWP sought a declaration that the material exiting MSP's kiln after burning SWP's waste (unmixed with any other waste) was a "product" within the meaning of 40 C.F.R. § 266.20(b)[7] and thus did not have to be disposed of as a "hazardous waste."

Following a trial on the merits, the jury was asked to respond to a total of thirteen interrogatories. The interrogatories that relate to the issues before us are as follows:

> 1. Was MSP entitled to a recycler exemption from the requirement of a permit as

[7] Section 266.20(b) states, in part as follows:

> Products produced for the general public's use that are used in a manner that constitutes disposal [(applied or placed on land)] and that contain recyclable materials are not presently subject to regulation if the recyclable materials have undergone a chemical reaction in the course of processing the products so as to become inseparable by physical means and if such products meet the applicable treatment standards * * *.

an operator of an incinerator of hazardous waste?

2. Were all of the hazardous wastes accepted by MSP beneficially used or reused or legitimately recycled?

If your answer to question number 2 is "YES", skip question 2(a) and go on to Question No. 3.

If your answer to question No. 2 in "NO", answer the following question No. 2(a).

2(a). Were all of he hazardous wastes accepted by MSP prior to August 21, 1991, beneficially used or reused or legitimately recycled?

3. Was the material produced by MSP from [SWP's] waste a "product" produced for the general public's use?

4. Did the waste material received by MSP from [SWP] undergo a chemical reaction in the course of processing the material so as to become inseparable by physical means?

5. Was the material produced by MSP from waste other than [SWP's] waste a "product" produced for the general public's use?

6. Did the waste material received by MSP from waste other than [SWP's] waste undergo a chemical reaction in the course of processing the material so as to become inseparable by physical means?

10. Is MSP's rotary kiln an aggregate kiln?

11. Are Oxidizers 1 and 2 aggregate kilns?

12. Is MSP's slag box an aggregate kiln?

13. Are the rotary kiln, oxidizers Nos. 1 and 2, and slag box part of a kiln system that produces aggregate?

The jury was unable to reach a decision on interrogatories 1-2 and 5-6. That is, the jury was unable to decide whether MSP was a "sham recycler" and was therefore required to obtain an incinerator permit before it began operating. In addition, the jury could not decide whether the material produced by MSP (other than from SWP's material) met the requirements of Section 266.20(b) (Recyclable material used in a manner constituting disposal) and thus was not subject to regulation as hazardous waste. The parties have indicated that these issues will be retried in the district court.[8]

With regard to the material from SWP (interrogatories 3 and 4), the jury responded in the affirmative. That is, the jury concluded that all materials produced by MSP from wastes sent by SWP when unmixed with other wastes satisfied the requirements of Section 266.20(b), and thus need not be disposed of as a hazardous waste. In response, the District Court entered a final judgment giving effect to the jury's findings on this issue. *See Judgment* and *Reasons for Judgment* (Civ. Action No. 90-1240, W.D. La. June 15, 1994) (granting SWP's motion for entry of judgment pursuant to rule 54(b) of the Federal Rules of Civil Procedure).[9]

[8] The district court also heard claims by the Agency alleging certain additional violations arising under the Clean Air Act, the Clean Water Act, and RCRA. By order dated August 30, 1994, the court assessed penalties against MSP for violations of each of these statutes. Specifically, for Clean Air Act violations (failure to obtain a Prevention of Significant Deterioration Permit and failure to obtain a permit for certain minor emission sources) the court assessed penalties of $3,500,000. For Clean Water Act violations (unpermitted discharges of non-contact cooling water) the court assessed a penalty of $3,000,000. Finally, for various RCRA violations (involving land disposal and storage requirements) the court assessed penalties of $1,500,000. The court noted that the $1,000,000 fine for storage violations was in addition to a $600,000 fine previously assessed for the same violations in an earlier criminal prosecution. *See United States v. Marine Shale Processors, Inc.*, Civ. Action No. 90-1240, Section "H", *Order and Reasons*, (August 30, 1994).

[9] Rule 54(b) states as follows:

> Judgment Upon Multiple Claims or Involving Multiple Parties.
>
> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

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On interrogatories 10 through 13, the jury made the following findings: MSP's rotary kiln is an aggregate kiln; MSP's oxidizers are not aggregate kilns; MSP's slag box is not an aggregate kiln; and the rotary kiln, oxidizers nos. 1 and 2, and the slag box are part of a kiln system producing aggregate. The court, however, did not enter a final judgment on these issues.

C. *Arguments on Appeal*

On October 20, 1994, MSP filed a petition for review with the Environmental Appeals Board. As stated previously, the Board granted MSP's petition on December 7, 1994, and held oral argument on January 12, 1995.[10] The Petition raises a total of nine arguments. These are as follows: 1) the BIF permit denial violated MSP's constitutional right to due process because the permit application was reviewed and decided upon by biased decisionmakers who had prejudged adjudicative factual and legal issues relating to the application; 2) under the separation of powers doctrine, the Board should defer to the rulings of the district court in the enforcement action and stay the current permit proceedings pending the outcome of that action; 3) under the Seventh Amendment to the United States Constitution, the Board may not rule on factual issues delegated to the jury in the enforcement action; 4) the board is collaterally estopped from redeciding issues previously decided by the district court; 5) the Region's use of the sham recycling criteria was clearly erroneous and violates the Administrative Procedure Act; 6) the Region's determination that MSP is not a legitimate recycler is clearly erroneous and based upon an incomplete review of the administrative record; 7) the Region's conclusion that MSP's facility does not meet the definition of an industrial furnace is clearly erroneous and impermissibly disregards the jury's findings and the district court's rulings in the enforcement action; 8) MSP's aggregate is a legiti-

> direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

[10] Following public notice of the Board's grant of review pursuant to 40 C.F.R. § 124.19(c), the Board received amicus briefs from the Environmental Technology Council and Concerned Mothers. In addition, the Board has received approximately 600 letters from various individuals asking that the Board suspend the current permit proceedings pending the outcome of the district court action. The Board has also received a letter from the Atchafalaya Delta Society opposing any stay of the current permit appeals process.

mate product within the meaning of 40 C.F.R. § 266.20; and 9) the Region may not deny the permit application based on the Region's conclusions regarding MSP's prior regulatory history.

For the following reasons, the Region's denial of MSP's BIF permit application is affirmed and this matter is remanded to Region VI so that the Region can issue a final permit denial.[11]

II. *DISCUSSION*

The Board's role in these permit proceedings is defined by section 124.19(a). Under that section, the Board ordinarily will not review a RCRA permit decision unless it appears to be based on a clearly erroneous finding of fact or conclusion of law, or involves an important policy consideration or exercise of discretion that warrants review. *See* 45 Fed. Reg. 33412 (May 19, 1980). Once the Board has granted review, as it has in this case, it will overturn the Regional Administrator's permit decision only if it concludes that: (1) the Regional Administrator's

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[11] In a motion dated November 4, 1994, the Region argued that the Board should dismiss the majority of the issues raised in MSP's petition for review on the ground that these issues were not raised during the public comment period. *See The Environmental Protection Agency's Expedited Motion to Deny Review* ("Expedited Motion"). The Board, however, declined to rule on any portion of MSP's petition prior to receiving the Region's response. The Expedited Motion was therefore denied. *See Order on the Region's Expedited Motion to Deny Review* (November 15, 1994). In its response to MSP's petition, the Region again argues that the Board should deny review on the majority of the issues raised in the petition on the ground that MSP failed to preserve these issues for review. *See* Region's Response at 38.

We agree with the Region that MSP's written comments in response to the proposed permit denial do not appear to be of sufficient specificity to preserve many of the above-mentioned issues for review by the Board. *See* 40 C.F.R. §§ 124.13 (persons objecting to a draft permitting decision "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under §124.10.") and 124.19 (a petition for review must include a "demonstration that any issues being raised [on appeal] were raised during the public comment period * * *."). We note, however, that many of the issues in dispute were indeed raised by various individuals during the comment period either in writing or at the March 14, 1994 public hearing and, as the Board has previously stated, as long as an issue has been raised by someone during the comment period, that issue is preserved for review even of the petitioner is not the one who made the comment. *In re Patowmack Power Partners, L.P.*, PSD Appeal Nos. 93-13, 93-14, at 3 (EAB, Feb 24, 1994) (an issue that is reasonably ascertainable during the comment period must be raised at that time by someone (not necessarily the petitioner) if it is to be preserved for review). In any case, given the importance of the issues involved and the fact that the Region (in responding to comments on the proposed permit denial) proceeded to address many of these issues, the Board has decided that, regardless of which issues were or were not raised during the comment period, the Board will examine the merits of MSP's petition. *See American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules if the ends of justice so require); *In re Genessee Power Station Limited Partnership*, PSD Appeal Nos. 93-1 through 93-7 at 6 n.5 (EAB, Sept. 8, 1983) (excusing failure to comply with filing requirements of 40 C.F.R. § 124.19 given the nature of the deficiency and the importance of the issues involved).

permit decision is based on a clearly erroneous factual or legal conclusion; (2) for compelling policy reasons, the Regional Administrator should have reached a different result; or (3) the Regional Administrator abused his or her discretion. On review, the burden is on MSP to show that the Regional Administrator's decision should be overturned. For the reasons set forth below, we conclude that MSP has not carried its burden.

As discussed in greater detail *infra*, we arrive at this conclusion by first examining the threshold issue of whether MSP's rotary kiln meets the definition of industrial furnace under 40 C.F.R. § 260.10. To meet that definition MSP had to show that its facility is more than an aggregate kiln in name; as an existing facility it must also function as an aggregate kiln by producing an aggregate product that is commercially recognized as such. The best evidence of commercial recognition is actual sales of commercial-grade aggregate in the market for which it is made. This market includes the Louisiana Department of Transportation and Development ("La. DOTD"), which is responsible for approving aggregate for use in State highway and related construction projects in Louisiana (MSP's home State). Under La. DOTD requirements, *all* aggregates must be from an approved source and, in order to be approved, "each sample submitted" shall pass all appropriate tests. AR Exh. A-15. If MSP's material does not qualify as commercial-grade aggregate our inquiry is ended, because unless MSP's facility is an aggregate kiln within the meaning of § 260.10, MSP is not an industrial furnace and is not eligible for a BIF permit. The Region denied MSP's permit application in large measure based on evidence that MSP's kiln does not produce or sell any significant quantities of commercial-grade aggregate. Although MSP introduced into the record evidence to show that some of its product is similar to commercial-grade aggregate in some respects, it failed to identify any evidence to this Board showing that, despite many thousands of tons of production, any substantial quantity of its product has in fact been used as a commercial-grade aggregate. Therefore, following a thorough review of the record, we agree with the Region's conclusion that MSP does not function as an aggregate kiln within the meaning of § 260.10. We therefore conclude, for that reason alone, that MSP's rotary kiln cannot qualify as an industrial furnace and that MSP is not entitled to a permit under the BIF rule. In such circumstances, MSP is required to obtain a permit from the State of Louisiana under the State-equivalent of the subpart O incinerator regulations.

In addition, as also discussed in greater detail *infra*, we reject MSP's process-oriented challenges to the Region's permit denial. These challenges include MSP's arguments as to why the Board is prevented

from even reaching the merits of the industrial furnace issue by the doctrine of collateral estoppel, by constitutional separation of powers considerations, or by the Seventh Amendment to the Constitution. We conclude that the Board is not so prevented. Also included among the process-oriented challenges is MSP's contention that the decisionmakers below prejudged the adjudicative facts at issue in this permit proceeding and thereby deprived MSP of its property without due process of law in violation of the U.S. Constitution. We conclude that MSP has not been denied its Constitutional due process rights.

A. *MSP's Status as an Industrial Furnace*

With promulgation of the BIF rule, a combustion device burning hazardous waste is subject to one of two possible regulatory regimes depending on how it is classified.[12] If it is classified as a boiler or an industrial furnace, it is subject to the BIF rule at subpart H of part 266; if it is classified as an incinerator, it is subject to the incinerator rules at subpart O of part 264. MSP does not claim that its facility meets the "boiler" definition, so its facility will be subject to the BIF rule only if it meets the definition of "industrial furnace."

The Agency defines the term "industrial furnace" as a combustion device that: (1) falls into one of several categories of combustion devices designated in the definition; (2) is an integral component of a manufacturing process; and (3) uses thermal treatment to accomplish recovery of materials or energy.[13] To date, the Agency has designated twelve categories of combustion devices in the industrial furnace definition: cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting and refining furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping liquor recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and halogen acid furnaces.

Both parties are in agreement that "only those devices specifically named in the regulations (*i.e.*, in the definition of industrial furnace contained in § 260.10) are considered to be industrial furnaces for purposes of the regulation." *See* 50 Fed. Reg. 627 (Jan. 4, 1985) (final rule promulgating industrial furnace definition). Thus, even if MSP's rotary kiln satisfies the second and third requirements listed above—that is, even if it is an integral component of a manufacturing process

[12] We note that prior to promulgation of the BIF rule the regulations and preambles to those regulations made it very clear that BIFs engaged *in any* waste destruction activities would be required to obtain an incineration permit under Part 264 Subpart O. *See* 40 C.F.R. § 264.340 (1990).

[13] *See supra* note 5 (definition of industrial furnace).

that uses thermal treatment to accomplish recovery of materials—it cannot meet the definition of industrial furnace unless it also falls into one of the twelve categories of devices designated in the definition.

MSP claims that its facility belongs to the aggregate kiln category. To qualify as an aggregate kiln MSP's facility must not only have a design that allows it to produce aggregate; it must also *function* as an aggregate kiln by actually producing aggregate, since a defining characteristic of an aggregate kiln is that it produces aggregate. A threshold inquiry in determining whether MSP's facility comes within the industrial furnace definition, therefore, is whether MSP's output constitutes aggregate for purposes of the regulation defining industrial furnace.

The resolution of this issue cannot hinge merely on MSP's belief that its output should be called aggregate. The Agency has expressly rejected the notion that the regulatory regime applicable to a facility should depend on the subjective purpose of the owner.[14] Rather, whether MSP's output constitutes aggregate must be judged according

[14] *See* 48 Fed. Reg. 14,483 (April 4, 1983):

> Although the existing definition of incinerator focuses on the purpose for which a device is used, the Agency did not intend to classify facilities solely on the basis of purpose. Rather, we intended that incinerators be distinguishable from boilers in order that the class of facilities subject to the standards for incineration be identifiable. The purpose for which a device is operated was used to indicate whether the device is an incinerator or a boiler. This distinction, however, has proven difficult to implement because the reference to "purpose" in the regulation introduced an unintended element of subjectivity.
>
> We accordingly are proposing a revised definition of incinerator that avoids the use of purpose to identify incinerators—so that facilities will no longer be able to escape regulation by claiming to have a primary purpose of recovery. The regulations do this by focusing on the physical character of the unit and not on its claimed purpose.

See also 50 Fed. Reg. 49,164 (November 29, 1985).

> In addition, as noted above, the Agency is moving away from tests based on purpose because the purpose of burning normally is unrelated to its environmental effect. Indeed, the argument that these rules (as well as RCRA section 3004(q) should apply only where energy recovery is the principal purpose of burning would resurrect the discredited "primary purpose" test formerly used by EPA to distinguish recycling from incineration. As both the Agency and Congress have stated, this standard was largely irrelevant for evaluating environmental effects of burning, and proved exceedingly difficult to administer. See 48 FR 14483 (April 4, 1983); S. Rep. No. 284, 98th Cong. 1st Sess. at 36 (1983).

to objective indicia. The language of the industrial furnace definition —particularly terms like "manufacturing process," "industrial process," and "product"—makes clear that appropriate indicia for making such a judgment must be drawn from a commercial context. Thus, to be an industrial furnace and exempt from the rules governing incinerators an existing combustion unit claiming status as an aggregate kiln must be producing and selling a commercially-usable aggregate product, recognized as such by those who buy, sell, or use aggregate in the ordinary course of their commercial dealings.

In its denial of MSP's BIF permit application, the Region looked to recognized experts to help determine whether MSP produces commercial-grade aggregate. These experts indicated that industries seeking to use aggregate material in civil engineering projects such as road and bridge construction must obtain material that conforms to certain specifications depending on how it is to be used. *See Summary of Studies and Technical Opinions of Dr. Dallas Little and Dr. W. Ronald Hudson With Regard to Output of Marine Shale Processors Incinerator Residue* ("Little & Hudson Report") AR Exh. A-14 at 3 ("all civil engineering projects have relatively tight specifications"); Louisiana Department of Transportation, Standard Specification for Roads and Bridges § 1003 (1982) AR Exh. A-15. The record shows, for example, that in Louisiana, MSP's home state, aggregate material must meet detailed specifications prior to use in road or other State construction projects and must pass all appropriate tests, including soundness and abrasion tests. *Id.* at Exh A-15 (all aggregates shall be from an approved source and shall pass all tests specified in the appropriate section).[15] Based on the results of tests performed by EPA experts and others (such as the Louisiana Department of Transportation and Development ("La. DOTD")), the Region concluded that "MSP's material is not useful by industries that use aggregate and is not a marketable aggregate product." Denial at 14.

In support of this conclusion, the Region relied primarily on a report by the La. DOTD addressing the use of MSP's output for road construction and the Little & Hudson Report addressing the civil engineering quality of MSP's output and the potential use of this output for such things as road and bridge construction.[16] *See* Denial at 13-14. The Region also relied on Dr. Hudson's expert testimony during the civil

[15] Louisiana also has detailed specification for aggregates used for such things as portland cement concrete, asphaltic concrete mixtures, and sand-shell mixtures. *See* AR Exh. A-15.

[16] Little & Hudson Report, AR Exh. A-14 at 1. The first page of the report states that it was "supported by the Texas Research and Development Foundation, and done in conjunction with Metcalf and Eddy and test results provided by Southwestern Laboratories."

enforcement proceeding regarding the potential usefulness of MSP's output as construction aggregate.[17] *Id.*

The record before this Board contained the following information. First, in 1989, the La. DOTD attempted to test MSP's material and concluded that: 1) it could not test MSP's so-called primary aggregate because it did not have the composition or particle size necessary to perform certain tests; and 2) MSP's so-called slagged aggregate did not pass soundness and abrasion tests required prior to the approval of aggregates for use in road construction. (AR Exh. A-15.). In fact, nothing in the record before this Board indicates the La. DOTD has ever approved MSP's material for any uses commonly associated with aggregate in the State of Louisiana.[18]

Second, the Little & Hudson Report detailed a variety of problems with MSP's output that would make this output of questionable value for use in construction projects. For example, the report states that due to the variability of the materials entering MSP's combustion facility and the "relatively random way in which the stock piles are stored, sorted, moved, and restored, there is considerable variability in the properties of the material [exiting the facility]." Little & Hudson Report at 3. The report states that "[s]ince all civil engineering projects have relatively tight specifications which require close tolerances on the various properties of the material and since the physical behavior of any material depends upon it[s] physical characteristics to a large extent, this variability is a severe detriment." *Id.* At the enforcement proceeding, Dr. Hudson testified that testing results revealed considerable variability in both the gradation (size) of the material and the material's water absorption. *See* Tr. Vol 9 at pp. 58, 62. According to Dr. Hudson, if the samples tested were "delivered to a construction site each day, you would not be happy if you had this much variability on a day-to-day basis in the water absorption of the material you purchased. It would make your construction process very difficult." *Id.* at 62. Dr. Little further stated that "any material that has day-to-day variability in its engineering properties [such as MSP's output] will have trouble and limited use as a construction material." *Id.* at 69.

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[17] *See* Trial Transcript Vols. 9-10. Hereinafter references to the trial transcript will be cited as follows: Tr. Vol __ at p. __.

[18] In this connection, it is clear that commercial-grade "aggregate" is recognized as a special product that can be tested and categorized for various purposes. We note that while MSP introduced testimony to suggest that MSP's material could have some possible uses as "aggregate," MSP has not established that MSP's material *by itself and without any further processing* could satisfy the La. DOTD requirements for use in State projects.

The Little & Hudson report further concluded that MSP's material would be unsuitable for the following uses: a) as base course or subbase material because the material does not meet La. DOTD gradation specifications (Little & Hudson Report at 8); b) as aggregate in portland cement concrete because the materials have not been approved by the La. DOTD, "are too fine for use as a coarse aggregate in concrete[,] * * * and do not meet gradation requirements for fine aggregate or sand." (*Id.* at 9); and c) as asphalt aggregate because of gradation variability and high moisture absorption in the "primary aggregate." *Id.* at 11. The study also found that the slagged material was unsuitable for use as an asphalt aggregate because it did not meet minimum specifications in abrasion tests.[19] *Id.* at 12. Dr. Hudson concluded that MSP's output is not an aggregate from an engineering perspective because it does not meet the necessary specifications required of aggregate generally used in the construction industry. Tr. Vol. 9 at 65. Although, Dr. Hudson did state that at least the "primary aggregate" could be used as general fill material, he indicated that "anything can be used as fill." *Id.* at 66. Dr. Hudson thus concluded that, in his expert opinion, neither MSP's "primary aggregate" nor its "slagged aggregate" could be considered "aggregate" from an engineering perspective. *Id.* at 65.

MSP has argued that the Region ignored clear evidence that the output from MSP's facility has a variety of potential uses including as general fill material, in brick material, asphalt, concrete, and tile. Petition at 193. MSP points out that several companies have already purchased MSP's material and have been completely satisfied with the material's performance. *Id.* at 189-191. In addition, several other individuals testified that, absent any restrictions, they would purchase MSP's material in the future. *Id.* at 191-92. MSP further contends that its assertions regarding the usefulness of MSP's output in construction-related activities are supported by various expert studies, but that the Region ignored these studies.

Although we recognize that MSP's experts testified on the *potential* for using MSP's material in asphalt, cement, or bricks, and that its material has some similarities to some commercial aggregate products,[20] we are struck by the fact that nothing in the record indicates

[19] In his testimony at the enforcement proceeding, Dr. Hudson stated that the results of abrasion testing indicated that MSP's output did not meet minimum requirements for asphalt concrete used in road paving. Tr. Vol 9 at 65.

[20] Among the record evidence cited in the petition for review in support of MSP's assertion that its facility produces commercial aggregate products is testimony of the following: a) Dr. Paul Queneau, a metallurgist who compared samples of slagged material generated by other facilities which

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that the material has ever in fact been used commercially for any of these purposes despite the fact that the facility has been in operation since July 1985.[21] Further, we are also struck by the fact that MSP's experts were themselves equivocal in their recommendations regarding the potential value of MSP's output. For example, Mr. Sendukas testified that he would not use MSP's material in asphalt mixtures nor did he recommend it for use in concrete mixtures. Tr. Vol. 30 at pp. 7-8. In fact, the only uses for which he would unequivocally recommend MSP's material is as general fill or for soil cement. *Id.* at 9. Mr. Sendukas further stated that the results of a 1988 slag characterization study

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produced and sold slag for commercial purposes with MSP's material and concluded that MSP's material has "similar" physical and chemical properties to other waste-derived products generated by these other facilities. Petition at 194; Tr. Vol. 35 at pp. 21-32; b) Dr. Serji Amirkhanian, a professor of civil engineering at Clemson University, who, in 1993, at MSP's request, conducted a study analyzing the potential for using MSP's material in asphalt and cement mixtures to determine if MSP's materials could be used for "parking lots, driveways, secondary roads, for basically private work," Tr. Vol 32 at pp. 39-41; *See also* AR Exh A-21, concluded that material containing 15% of MSP's "slag aggregate" and 10% "primary aggregate," when compared to control samples, "really produced pretty much the same results * * *." Tr. Vol. 32 at pp. 40-41. Dr. Amirkhanian also conducted tests to determine whether MSP's material would be useful in concrete, *Id.* at 43, and based on these tests, concluded that cement samples containing 15% primary material (combined with other presumably non-MSP aggregate sources), could be used for parking lots, driveways, secondary roads and sidewalks. *Id.* at 43-49; c) Richard E. Root, President of Chicago Testing Laboratory, an engineering company providing consulting services to the asphalt paving industry, AR Exh. A-20, conducted a laboratory analysis of MSP's material in 1991 to determine its usefulness in asphalt mixtures for road paving, Tr. Vol. 30 at p. 63, and concluded that MSP's material "could be used successfully in asphalt mixtures." *Id.* at 78; and d) V.E. Sendukas, a professional engineer employed by the consulting firm of Woodward-Clyde, participated in a feasibility study of the beneficial uses MSP's material in February of 1987, *see* Tr. vol. 29 p. 24; AR Exh. A-17, and concluded that MSP's "primary aggregate" is suitable for use in cement stabilization and that, *when stabilized with cement*, the resulting material passes La. DOTD standards for soil cement, Tr. Vol 39 at pp. 34-35, and as embankment foundation for road construction. *Id.* at 61. MSP also relies on the following reports: a) a report prepared in December of 1993, by Dr. Denis A. Brosnan, a professor of ceramic engineering and director of the Center for Engineering Ceramic Manufacturing at Clemson University, AR Exh. A-18, in which Dr. Brosnan described MSP's "primary aggregate" as being fully analogous to "calcined clay aggregates" useful for such things as "fill in insulating products, for production of concrete block, and for other general uses of aggregates including construction, fill, and paving." *Id.* at 4. The slagged material was classified as "glass ceramic" that is "fully analogous to other glass ceramics including 'corning ware' (TM) which are well known in commerce." *Id.* at 5. According to Dr. Brosnan, MSP's material could be useful in both the brick making process and in the production of structural tiles. Petition at 198; AR Exh. A-18 at 25-26; and b) a report prepared at MSP's request by Barry L. Moore, a civil engineer working in the material testing field. Mr. Moore reviewed the studies prepared by experts relied on by the government in the civil enforcement proceeding and prepared a summary of his opinions regarding the usefulness of MSP's material. *See* AR Exh. A-24. Contrary to the view of the government's experts, Mr. Moore found that MSP's material was suitable for a variety of applications such as: "pipe backfill," the development of base or surface coarse when blended with other aggregate materials, asphalt, and as fine aggregate in Portland cement concrete. *Id.* at 1; Petition at 199.

[21] We acknowledge that MSP has been prevented from selling its material since 1989. However, this still leaves a four-year period within which MSP's material was not sold as commercial-grade aggregate but used primarily as general fill.

indicated that MSP's slagged material had "limited potential as a construction material since it is extremely brittle and can be easily crushed by moderate pressure or impact." *Id.* at 28.[22] In addition, in a February 24, 1987 letter from Mr. Sendukas to Larry Johnson, MSP's Environmental Manager (AR Exh. A-19 (Plaintiff's exh. 7 to Jan. 28, 1993, deposition of V. E. Sendukas)), Sendukas stated that MSP's "aggregate samples" were tested and compared to La. DOTD specifications for seven classes of aggregates used in highway construction. The results of this comparison indicated that MSP's material "meets *only* the gradation requirements for sand used in Sand-Shell mixtures * * *." (Emphasis in original). The letter also states that the material was evaluated to determine if, subsequent to further processing, the material might have other uses. The letter states that the material "does not meet any DOTD specifications until it has been screened over the No. 80 sieve; at that point it barely meets the requirements for concrete sand. It should be considered, however, that processing through a No. 80 sieve will remove approximately 50 percent of the original material for which we have not determined any possible use." *Id.* at 2. The letter concludes that the most promising use for the material "will be as sand in DOTD Sand-Shell mixtures or as a 'fill' material." *Id.*

In addition, during his deposition, Mr. Sendukas expressed his full agreement with the conclusions of a study done by the Petrographic Laboratory of the United States Bureau of Reclamation (the "Bureau"). AR Exh A-19 (January 28, 1993 deposition of V. E. Sendukas at 466-67). In a memorandum dated October 5, 1988, reporting the results a petrographic examination of MSP's material designed to determine the suitability of the material for use in aggregate concrete, the Bureau, using applicable standards adopted by the American Society for Testing and Materials "with emphasis on the uniformity and homogeneity of the material," concluded as follows:

> Visual observation, petrographic particle count, and physical properties tests including gradation, absorption, and average specific gravity indicate the product produced by burning organic and inorganic wastes are not uniform and homogeneous in particle type, size distribution, and physical quality.
>
> Petrographic examination and physical quality evaluation tests indicate [that the sampled materials] are of

[22] According to Mr. Sendukas, the 1988 study indicted that if MSP were to air cool its slagged material, the material would have better possibilities for use as a construction material. Tr. Vol. 30 at p. 28. MSP, however, never adopted this suggestion. *Id.* at p. 30.

> poor physical quality and would be unsuitable for use in Reclamation concrete.

AR Exh A-19 (Plaintiff's Exhibit 10 to January 28, 1993, deposition of V. E. Sendukas), at 7.

Finally, we find it significant that the authority charged with approving aggregate sources in the State of Louisiana has not approved MSP's facility as an "aggregate source." As stated above, any aggregate used in Louisiana State highway and related construction projects must come from an approved source and each aggregate sample must pass all appropriate tests. *See* AR Exh. A-15. The record indicates, however, that the only time MSP's material was tested to determine whether it met minimum requirements for aggregate under La. DOTD specifications, the material did not meet applicable specifications. AR Exh. A-15. MSP does not dispute this, nor does it assert that the La. DOTD has ever officially approved MSP's material for any use in the State of Louisiana.[23]

Indeed, the evidence regarding the actual use of MSP's material indicates that it has been purchased primarily for use as general fill material. *See* Petition at 187-189. While we recognize that general fill material can certainly serve an engineering purpose in certain types of construction activities,[24] we agree with the Region that material suitable for use as a general fill material does not by that fact alone meet the requirements for "aggregate" as contemplated by Section 260.10.[25] *See* Denial at 16-17.

Thus, despite the fact that MSP presented testimony tending to support its assertion that the material it produces "could" have a variety of potential uses, viewing the record in its entirety, we do not believe that the Region committed any error in concluding that MSP's facility does not function to produce a commercial-grade aggregate and thus cannot be classified as an "aggregate kiln" as contemplated by 40 C.F.R. § 260.10. In our view, for a so-called "aggregate kiln" that

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[23] In fact, one of MSP's expert witnesses (Mr. Sendukas) confirmed that neither MSP's so-called primary aggregate nor its so-called slagged aggregate has ever been included on the list of qualified products maintained by the La. DOTD. *See* Tr. Vol. 30 at pp. 48-49.

[24] As MSP states in its petition, Dr. Hudson testified at the civil enforcement proceeding that fill material can in certain instances serve an engineering purpose, such as for raising the level of a site to prevent flooding. Tr. Vol. 10 pp. 9-10.

[25] *See* 56 Fed. Reg. 7,159 (Feb. 21, 1991) ("The Agency has long been skeptical of claims that hazardous wastes are 'recycled' when they substitute for very commonly available and economically marginal types of raw materials.").

claims to have been in the "aggregate manufacturing" business since July of 1985,[26] MSP should have easily been able to produce convincing and unequivocal evidence of actual commercial uses and sales of its material as commercial-grade aggregate, rather than having to rely on testimony regarding potential uses of its material or on laboratory comparisons of its material with that of others. Yet, despite its longevity and the fact that MSP has produced over 285,000 tons of material,[27] MSP was not able to counter the Region's contention that MSP has never established the existence of a market for its so-called aggregate by showing that it has regularly sold its aggregate for use in industries typically utilizing commercial-grade aggregate, such as, industries engaged in highway or building construction or cement manufacturing.[28] As noted, for the most part MSP could only produce witnesses to say they purchased the material for general fill.[29] In such circumstances, we agree with the Region's finding and conclusion that MSP's facility is not an aggregate kiln. We therefore conclude that the Region was correct when it determined that MSP does not operate an aggregate kiln[30] within the meaning of Section 260.10, and is not, therefore, an industrial furnace.[31] For the reasons stated above, we affirm the Region's permit denial.[32]

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[26] See *supra* note 21.

[27] Region's Response at 15.

[28] *See* Denial at 31.

[29] As the Region has pointed out, the vast majority of the material produced by MSP has been used as fill material either on MSP's property to raise the grade of several acres above the 100-year flood plain (using approximately 147,000 tons of material) or has been sold to Recycling Park Inc., a sister corporation owning approximately 200 acres of property near the facility, for the development of an industrial park (using approximately 174,000 tons of material). Region's Response at 15-16.

[30] This is our first occasion to interpret the meaning of aggregate kiln. *See Beazer East, Inc. v. EPA*, 963 F.2d 603, 610 ("It is of little consequence that EPA's interpretation is new. Indeed, even if the EPA's interpretation * * * was developed for the first time in an agency adjudication, we would give the agency no less deference than if it had promulgated an interpretive rule."). In arriving at the conclusion that MSP's facility is not an aggregate kiln, we do not rely on the "sham recycling criteria" but on the language of Section 260.10 itself. Thus, we do not address MSP's contentions regarding application of the sham recycling criteria in this proceeding.

[31] In this connection, the fact that the material produced by MSP may well be a "product" within the meaning of 40 C.F.R. § 266.20, is not dispositive of the question of whether MSP's product is "aggregate." Here, there is more than sufficient evidence from which the Region could correctly conclude that MSP's product is not "aggregate."

[32] As an additional basis for denying MSP's permit application, the Region concluded that MSP's rotary kiln is not an integral component of a manufacturing process. The Region's conclusion is based on its determination that MSP burns hazardous waste at the facility primarily for the purpose

Continued

B. *Collateral Estoppel, Separation of Powers, and the Seventh Amendment*

MSP argues that the Board is prevented from reaching the issue of whether MSP's facility is an industrial furnace by the doctrine of collateral estoppel, by constitutional separation of powers considerations, and by the seventh amendment to the United States Constitution. For the reasons set forth below, these arguments are rejected.

1. *Collateral Estoppel*

In late May 1994, approximately four months *after* the Region had tentatively determined that MSP's facility did not meet the definition of an aggregate kiln,[33] a trial took place in the RCRA enforcement action and the case was submitted to the jury for its verdicts on several interrogatories posed to it by the court. The jury, however, was unable to arrive at a unanimous decision on all of the interrogatories, and was discharged from further service on the case on May 24, 1994.[34] As a direct consequence of the jury's indecisiveness, MSP moved for, and was granted, a mistrial on the undecided interrogatories. Tr. Vol. 59, at 12-13, 24 (May 24, 1994). Moreover, because of the incompleteness of the jury's verdicts, the court was unable to enter a judgment on any of the claims against MSP (although the verdicts were sufficient for the court to enter a judgment on Southern Wood Piedmont's (SWP's) claim, which concerned the regulatory status of certain materials that SWP had sent to MSP). Thus, at the end of the current phase of the district

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of destruction, rather than for legitimate recycling purposes. In upholding the Region's denial of MSP's permit application, we do not rule on this conclusion. While we need not definitively decide the issue now, we note that we have serious doubts as to whether after promulgation of the BIF rule the purpose for which MSP is burning hazardous waste at the facility is relevant to the determination of whether MSP's facility meets the industrial furnace definition. Our reading of the language and history of the industrial furnace definition and the BIF applicability provision at section 266.100(a) suggests that a BIF may be engaged in multiple enterprises, including burning wastes for destruction and thus, the purpose for which hazardous waste is burned at the facility has little or no bearing on whether the facility meets the industrial furnace definition. Nor is the purpose relevant by reason of the fact that MSP claims to be using hazardous wastes as ingredients in its process.

The Region's permit denial was also based on the belief that MSP's oxidizers are themselves incinerators. Thus, according to the Region, even if MSP were indeed engaged in a manufacturing process and the oxidizers were considered to be integral components of that process, the facility would still require an incinerator permit. *See* Proposed Denial at 27-28; Denial at 1. However, as today's decision affirms the Region's permit denial on the ground that MSP's facility does not produce aggregate as contemplated by 40 C.F.R. §260.10, and therefore does not meet the definition of an industrial furnace, we do not decide the status of MSP's oxidizers.

[33] Proposed Denial at 1 (January 31, 1994).

[34] Tr. Vol. 59 at p. 24 (May 24, 1994).

court RCRA enforcement proceeding as we know it, the case is subject to a retrial (except for the SWP matters).

The record before us does not disclose what effect, if any, the court intends to give on retrial to the interrogatories for which the jury was able to provide answers.[35] For example, the jury affirmatively found that MSP's "rotary kiln was an aggregate kiln" (Interrogatory 10), and the "rotary kiln, Oxidizers Nos. 1 and 2, and slag box [are] part of a kiln system that produces aggregate" (Interrogatory 13).[36] Based on these answers, MSP strenuously argues that the Region was precluded, under the doctrine of collateral estoppel, from having decided in its September 15, 1994 final permit decision that the facility is not an aggregate kiln. Petition at 47-53. In response, the Region argues with equal conviction that the jury's answers are not entitled to preclusive effect, since the requirements of collateral estoppel are not satisfied in this instance.[37] Region's Response at 83-110. As discussed below, we believe that the law in the Fifth Circuit, which is controlling for purposes of analyzing the alleged preclusive effects of the jury's answers, is on the side of the Region.

There are three elements to collateral estoppel: (1) the controverted issue must be identical in both the prior and subsequent actions; (2) the issue must have been actually litigated in the prior action; and (3) the resolution of the issue in the prior action must have been a necessary part of the judgment in the earlier action. *Recoveredge L.P. v. Pentecost*, 1995 U.S. App. LEXIS 3019 at 15 (5th Cir., Feb. 17, 1995); *Hughes v. Santa Fe Intern. Corp.*, 847 F.2d. 239, 240 (5th Cir. 1988). For purposes of this decision, we assume that the first two elements

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[35] MSP refers to the jury's answers as a "dispositive jury verdict." Petition at 51, n.12. The only matters originating in the jury that are appropriately characterized as a "dispositive jury verdict" are the jury's answers to Interrogatories 3 and 4, which form the basis for the court's entry of a judgment respecting the regulatory status of material produced by MSP from SWP's materials. As such, that verdict is not dispositive of the aggregate kiln status of MSP's facility.

[36] The jury determined however that neither oxidizers nos. 1 and 2 nor the slag box were aggregate kilns (Interrogatories 11 and 12).

[37] The Region's position on appeal is consistent with its determination in the final permit denial decision that the jury's answers did not preclude it from finding that MSP's facility was not an "aggregate kiln" for purposes of 40 C.F.R. §260.10 (defining "industrial furnace"). *See* Denial at 1 ("EPA has determined that it will deny the permit application because MSP does not meet the definition of "aggregate kiln * * *."); Denial at 2 ("the Agency does not regard the inconclusive trial as in any way foreclosing its ability to reach a final determination on the permit application or obviate the need to do so.").

have been satisfied.[38] As to the third element, it reflects in part the finality of an issue's resolution. In other words, an issue that has been resolved and incorporated into a final judgment has the requisite finality. The focal point of our analysis therefore centers on the finality of the jury's answers to Interrogatories 10 and 13, which declare that the MSP facility is an aggregate kiln, in direct contradiction to the Region's tentative determination of January 31, 1994 (which the Region later reaffirmed in its final decision of September 15, 1994). As discussed below, we conclude that the requisite degree of finality is missing from the jury's answers to these interrogatories.

In *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265 (5th Cir. 1986), the court clearly affirmed that in the Fifth Circuit collateral estoppel is only applicable when a final judgment is rendered.[39] The court held that a partial, interlocutory summary judgment "was not a final judgment for purposes of either true res judicata or collateral estoppel," explaining as follows:

> As we said in *International Union of Operating Engineers v. Sullivan Transfer, Inc.*, 650 F.2d 669, 676 (5th Cir. 1981), "[t]he requirement of finality applies just as strongly to collateral estoppel as it does to res judicata." See also, e.g., *White v. World Finance of Meridian, Inc.*, 653 F.2d 147, 149-52 (5th Cir. 1981) (reciting "final

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[38] In this connection, we do not necessarily agree that the issues are, in fact, identical. Whether MSP's combustion facility is an industrial furnace within the meaning of Section 260.10 requires the application of law to facts, and we do not read the jury's answers to the interrogatories as necessarily sufficient to answer the legal issue.

[39] In *Avondale*, the court held that since a partial, interlocutory summary judgment is not a final judgment, it does not have any res judicata or collateral estoppel effect. The prior action was a personal injury action involving a shipfitter and a ship that was under construction in a shipyard. The partial summary judgment addressed the issue of the ship's ownership, and held that the shipyard owner, Avondale, was the owner *pro hac vice* of the vessel in question. The personal injury action was eventually settled, and the court signed a final judgment approving the settlement with the injured shipfitter but without making any reference to the holding in the partial summary judgment.

A subsequent action in another court was brought by Avondale against Avondale's insurer and the employer of the injured shipfitter, in an effort to collect on an insurance policy and to be indemnified by the employer under the terms of its contract with Avondale. Avondale asserted that the earlier partial summary judgment, holding that it was the owner *pro hac vice* of the vessel, was decided incorrectly, and therefore it should not be barred from recovering insurance by reason of a "watercraft exclusion" in the insurance policy. Avondale made similar contentions regarding the indemnity matter. The district court ruled against Avondale on that point, but on appeal, the Fifth Circuit agreed with the shipyard owner and held that Avondale was not collaterally estopped from relitigating the ownership question by reason of the earlier partial summary judgment.

> judgment" requirement for both claim and issue preclusion). This partial summary judgment order did not even determine Avondale's liability—there being no determination either of fault on its part or of causation—much less King's damages, and hence was interlocutory and not appealable. Cf. Fed.R.Civ.P. 56(c) (summary judgment on liability alone "interlocutory in character").

786 F.2d at 1269 (footnote omitted) (brackets in original).

Importantly, the court in its ruling specifically acknowledged that there are some authorities which hold that less than complete finality may nevertheless suffice for purposes of issue preclusion, or collateral estoppel. It noted, however, that the most prominent of these cases involved instances where the issues were already resolved on appeal before the final judgment in the first action. 786 F.2d at 1270. It expressly declined to apply the doctrine of collateral estoppel to situations where appellate review had not taken place. *Id.* at 1270-71. The court also expressly disavowed the position espoused in the Restatement (Second) Judgments, § 13, which adopts the view that final judgments for purposes of issue preclusion include a prior adjudication in another action that is "sufficiently firm" to be accorded "conclusive effect."[40] It noted that Moore's Federal Practice treatise takes the position that the Restatement approach presents serious problems. Accordingly, the court concluded that it would not depart from its previously stated rule that "an order granting partial summary judgment 'has no * * * collateral estoppel effect.'" 786 F.2d at 1272 (citation omitted).[41]

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[40] Section 13 of the Restatement (Second) Judgments provides as follows:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

[41] The Court of Appeals for the Fifth Circuit may have recently ignored its own carefully considered opinion on this point. In *Recoveredge L.P. v. Pentecost, supra,* the court appears to rely on the Restatement view regarding conclusiveness, *id. at 31,* despite the explicit rejection of that view in *Avondale Shipyards, Inc.* Specifically, the court suggests parenthetically that a "jury verdict rendered before entry of final judgment is conclusive for purposes of issue preclusion." *Id.* (parenthetical reference to comment "g. illus. 3" of the Restatement, § 13). The fact that it made this comment without mentioning the scrutiny given to the Restatement in *Avondale Shipyards, Inc.*, suggests that the court may have overlooked the *Avondale* precedent (even though *Avondale* appears in a string cite elsewhere in the court's opinion, but for an unrelated matter). In any event, because there are untold circumstances that might result in modification or even outright rejection of a jury verdict prior to entry of final judgment, we think a more accurate rendition of the point the court was

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Because the issues decided by the jury in the MSP case have not been incorporated into a final judgment, or partial final judgment,[42] we find that the jury's answers to the aggregate kiln interrogatories lack the requisite finality to be accorded preclusive effect in this permit proceeding. We arrive at this result based on our understanding of the law in the Fifth Circuit. *See, Avondale Shipyard, Inc., supra.* In addition, we base it on the following additional considerations, which establish, individually and collectively, that the jury's answers are not sufficiently firm to be accorded preclusive effect. First, we don't know what effect the district court intends to give to the jury's answers on retrial, e.g., the extent and manner to which they will be integrated into the proceedings on retrial. The district court expressed uncertainty over the relevance of the jury's answers to Interrogatories 10 and 13 to any final judgment that might be rendered in the continuing enforcement action, noting that the answers *"may be of no consequence"* because "[t]he only real issue concerning interim BIF status may be whether Marine Shale was a recycler before the BIF regulation went into effect." Order and Reasons: Motions for Judgment under Rule 54(b), at 6, n.1 (Civ. Action No. 90-1240, W.D. La. June 21, 1994) (emphasis added). Second, because the jury's answers to Interrogatories 10 and 13 have not been incorporated into a judgment having finality, the issues decided by the jury are subject to retrial before another jury, pursuant to the court's plenary authority under Rule 54(b) to revise any order or form of decision (which encompasses jury verdicts) not certified final in accordance with the rule. Fed. R. Civ. P., 54(b); *see Thompson v. Trent Maritime Company, Ltd.*, 343 F.2d 200, 203 (3rd Cir. 1965) ("[I]t is submitted that, under the language of Rule 54(b), wherein it refers to 'any order or other form of decision, however designated,' is inclusive of jury verdicts, as well as court orders."). Third, the jury's answers are also subject to revision under Rule 49 if they are in any way inconsistent with the answers to any other interrogatories on retrial, or with any general verdict. Fed. R. Civ. P., 49. Fourth, the jury's answers are presumably subject to a motion notwithstanding the verdict at end of the new trial. *See* Fed. R. Civ. P., 50. Fifth, the jury's answers have not been subject to appellate review, which could only take place after the retrial. Sixth, and last, since the jury did

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intending to make in *Recoveredge* is that a jury verdict rendered before entry of final judgment "may be" (rather than "is") conclusive for purposes of issue preclusion. Even under *Recoveredge*, the jury's answers to Interrogatories 10 and 13 still would not be given preclusive effect, since, as explained elsewhere in the text, they are not sufficiently firm to be given that effect.

[42] Under Rule 54(b) of the Federal Rules of Civil Procedure a judge may enter a judgment on less than all of the claims pending before the court if he or she finds that there is no just reason to delay the case further and specifically directs the clerk to enter judgment on the claim(s) in question. Absent compliance with those requirements, any such ruling on less than all the claims is subject to revision at any time. The text of the rule appears in footnote 9 above.

not answer the interrogatories until after the Region had already made a tentative determination to the contrary on the aggregate kiln issue, there is ample basis for arguing that the Region's final decision, which relates back to the earlier tentative determination, is actually prior in time to the jury's answers. In that event, the jury's answers lack the necessary temporal quality of being antecedent to the Region's determination for preclusion to take effect.

As a separate matter, MSP also contends that, in addition to the jury's answers, various rulings of the district court should be accorded preclusive effect and thereby preclude the Region from determining that MSP is not an aggregate kiln, or industrial furnace. Petition at 47-53. This contention is also subject to, and fails, the finality test of *Avondale Shipyards, Inc.* There simply has been no ruling by the court that constitutes a final judgment precluding the Region from determining that MSP's facility is not an industrial furnace. The district court's only ruling under RCRA, of which we are aware, that has attained the requisite finality (i.e., reduced to a final judgment under Rule 54(b)) is the ruling that concerns the regulatory status of materials produced by MSP from Southern Wood Piedmont (SWP) materials. *See Judgment* and *Reasons for Judgment* (Civ. Action No. 90-1240, W.D. La. June 15, 1994). That ruling was made pursuant to Rule 54(b), and thus may be regarded as final for purposes of issue preclusion. However, the conclusion in that ruling that such materials are not subject to regulation as hazardous waste does not in any way compel the conclusion that MSP'S facility is an aggregate kiln or an incinerator. The ruling was based on the jury's answers to Interrogatories 3 and 4, which do not reach the issue of MSP's status as an aggregate kiln. Therefore, contrary to MSP'S contentions, that ruling does not preclude the Agency from denying MSP a permit under 40 C.F.R. Part 266 on the grounds that the facility is not an aggregate kiln.

Accordingly, for the reasons stated above, we conclude that collateral estoppel is not a bar to the Region's denying MSP's permit application on grounds that the MSP facility is not an aggregate kiln, and hence, not an industrial furnace.

2. *Separation of Powers Doctrine*

MSP contends that EPA is violating the separation of powers doctrine of the Constitution by continuing the permit proceeding while the enforcement case is pending before an Article III court. Petition at 38-43. To correct this situation, MSP argues that: (1) EPA must defer to various determinations of fact and law made in the district court pro-

ceeding;[43] and (2) EPA must stay its hand in this matter pending the outcome of the district court proceeding. The basis for this latter contention is not entirely clear, for MSP neither explains it clearly nor cites any case law directly analogous to the instant proceeding.[44] *See id.* We will assume for the sake of discussion, however, that MSP is contending that the Region has in some way first submitted a particular matter for decision to the court but has subsequently initiated a separate administrative proceeding to resolve the same matter. If that were the scenario presented to us we would agree that an issue would arise as to which forum should properly exercise jurisdiction in those circumstances. But that is demonstrably not the situation we face.

Here, we are confronted with one proceeding that was initiated by the Region and the other by MSP. EPA Region 6 initiated the first proceeding by filing a civil lawsuit in federal district court in June of 1990, alleging *inter alia* that MSP's combustion of hazardous waste since it began operating in 1985 constituted incineration rather than legitimate recycling. Thus, according to the Region, MSP was required to obtain an incineration permit from the Louisiana permitting authorities (because authority to administer the incinerator permit program

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[43] For all practical purposes, this contention is addressed separately, above, under the collateral estoppel discussion.

[44] MSP appears to rely principally upon *Town of Deerfield, N.Y. v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993), in which the court held that "[a] *judgment* entered by an Article III court having jurisdiction to enter that *judgment* is not subject to review by a different branch of the government." (Emphasis added.) Yet, MSP points to no judgment of the district court that the Agency is allegedly ignoring or implicitly overturning. MSP also relies heavily upon the dissenting opinion in *Hunt v. CFTC*, 591 F.2d 1234 (7th Cir.), *cert. den.*, 442 U.S. 921 (1979). There the majority rejected an attempt to enjoin an administrative enforcement action, which the CFTC had commenced in court "based on the same violations of law involved in the administrative proceedings, but seeking different relief." *Hunt*, 591 F.2d at 1235. MSP's reliance on this case is unavailing, for it avoids the holding in the case and relies exclusively upon the dissent, which is obviously not the law of the case. Another case upon which MSP places considerable reliance is *California v. FPC*, 369 U.S. 482 (1962). But that case is distinguishable, in part, at least, on the grounds that the executive branch of the government was itself divided over the Federal Power Commission's exercise of administrative jurisdiction. The Attorney General was in court prosecuting a civil antitrust action regarding the acquisition of one corporation's stock by another, yet the FPC, an independent agency, was approving the merger of the two corporations. The Attorney General opposed the FPC's exercise of administrative jurisdiction to approve the merger, for that approval was obviously inconsistent with the position being taken in court by the Department of Justice. Under the circumstances, it is not surprising that the Court held: "We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of the that transaction under the antitrust laws? We think not. We think the Commission in those circumstances should await the decision of the courts." 369 U.S. at 487. In the instant proceeding there is no such conflict between the Department of Justice and EPA; therefore, for that reason alone, *California v. FPC* is not controlling.

had previously been delegated to the State)[45] under State regulations governing the incineration of hazardous waste. Since MSP had not obtained a State incineration permit, the government's lawsuit alleged violations of the RCRA permitting requirements. Importantly, at the time of filing the lawsuit, the BIF rule requirement was not even in existence. Although the Agency had earlier proposed rules governing the permitting of BIFs, the rules were not adopted in final form until their promulgation in the *Federal Register* on February 21, 1991. 56 Fed. Reg. 7134, *et seq.* The second proceeding was initiated by MSP, solely of its own volition, in May 1991, when it filed a Part A application for a BIF permit in order to obtain interim status under the BIF rule. In addition, in April of 1992, in response to Region VI's directive to file Part B of the application, MSP submitted a six-volume application for a BIF permit.[46] By submitting Part A of the application, MSP took the first formal step in requesting the Region to issue it a permit under the BIF rules; also, by submitting a six-volume application in response to the Region's subsequent request that it file Part B of the application, MSP thereby further confirmed its intention that EPA should proceed with the processing of the permit application. Following review of the permit application, the Region proposed denial of the permit on January 31, 1994, and thereafter, following a public hearing and period for public comment, made the final decision on September 15, 1994. (Although the Region obviously did not grant MSP's request for a BIF permit, it did ultimately make a decision on the request, which is all that any applicant is entitled to after asking the Agency to process a permit application.)

From the foregoing chronology, it can readily be seen that the two proceedings arose separately; and since the second proceeding was

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[45] The State of Louisiana received interim authorization to administer its hazardous waste program in lieu of the federal program on January 24, 1984. Final authorization was effective on February 7, 1985. *See* 50 Fed. Reg. 3,348 (Jan. 24, 1985).

[46] To obtain an operating permit, a hazardous waste management facility must file a permit application consisting of part A and part B. Part A is a short form containing certain basic information about the facility, such as the facility name, location, nature of business, regulated activities, and a topographic map of the facility site. 40 C.F.R. § 270.13. Part B requires substantially more comprehensive and detailed information that demonstrates compliance with the applicable technical standards for hazardous waste management facilities. 40 C.F.R. § 270.14. New facilities must submit part A and part B at the same time. 40 C.F.R. § 270.10(f)(1). An existing hazardous waste management facility (*i.e.*, one that was in existence on November 19, 1980) or one that was in existence on the date of any statutory or regulatory change that makes the facility subject to RCRA), however, need only notify EPA of its hazardous waste management activity and file part A to obtain interim status and continue operations. 40 C.F.R. §§ 270.10(e) and 270.70(a). Existing facilities that have already filed part A to gain interim status, must submit part B in accordance with any applicable statutory deadline or earlier if requested by EPA or an authorized State. 40 C.F.R. § 270.10(a) ("Persons currently authorized with interim status shall apply for permits when required by the Director.").

initiated by MSP, that proceeding can scarcely be characterized as an EPA-initiated push to acquire jurisdiction over matters properly reserved to the district court under Article III of the Constitution. The permit proceeding thus went forward at the behest of MSP, *after* the enforcement action against it had been filed in district court. Nevertheless, early on MSP could have sought a suspension of the permit proceeding if it truly believed that a constitutional collision between EPA and the courts was about to occur. For example, immediately after filing the Part A application, MSP could have requested the Region to stay processing of the application, but it did not. It also could have requested the Region to stay further processing of the application when it was asked to file Part B of the application, but it did not. In fact, MSP did not ask the Agency to stay its hand until shortly after it received the Region's proposed decision on its permit application.[47] Thus, it was not until after MSP was able to take a look at the Region's hand did it become inspired to seek a stay of the very proceeding it had initiated. The Region denied the request on February 22, 1994, responding in part as follows:

> EPA disagrees with your characterization that [the] proceeding on the permit application causes irreparable harm to MSP and is a wasteful use of administrative resources. First, MSP's vice president and general counsel George Eldredge has already been quoted as stating that "whatever action EPA proposes, and whatever the outcome of the lawsuit, the case is going to drag on for years. In the meantime, we'll be doing business as usual." This assessment contradicts your assertion of irreparable injury. We also note that it was MSP that filed the permit application, and the application has been reviewed by EPA and is ready for administrative disposition. It is in fact an Agency permitting priority, announced as part of the Agency's May 1993 Draft Combustion Strategy, to expedite processing of permit applications of existing, operating hazardous waste burning incinerators, boilers and industrial furnaces. Furthermore, as you are aware, *a key reason for the timing of the Agency's tentative denial was the express urging of the District Court in the civil enforcement action.*

Letter from Walter L. Sutton, Jr., *Acting Regional Counsel, Region 6*, to Christopher H. Marraro, *Howrey & Simon* (Feb. 22, 1994) (emphasis added) (citations omitted). Thus, assuming that there is no material error in the Region's characterization of the district court's actions, it appears that not even the court looked upon the Region's processing

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[47] Letter from Christopher Marraro, *Howrey & Simon*, to Carol M. Browner, *Administrator of EPA* (Feb. 10, 1994). This letter was eventually referred to the Region for response. *See* Letter from Walter L. Sutton, Jr., *Acting Regional Counsel, Region 6*, to Christopher H. Marraro, *Howrey & Simon* (Feb. 22, 1994).

of the permit application as an infringement upon the court's powers. We naturally see no reason to find a conflict between the court and the Agency when the court itself sanctioned the continued processing of MSP's application. Although obviously there are overlapping issues in the two proceedings, their resolution is aimed at fundamentally different objectives, which fall outside of each other's assigned domain. Thus, the court is charged with determining whether MSP violated pre-BIF rule permitting regulations, whereas EPA is charged with applying the BIF rule in determining whether MSP is entitled to receive a BIF permit in the BIF rule era. For obvious reasons, the court is in no position to make the latter determination; nor is EPA in a position to make the court's ruling.[48]

Accordingly, we reject MSP's contention that continuation of this proceeding violates the separation of powers doctrine of the U.S. Constitution.

3. *The Seventh Amendment and Issues Before the Jury*

Because there are issues in the district court enforcement action that are common to issues before the Agency in the administrative permit proceeding, and because the enforcement action is being tried before a jury, MSP contends that the Seventh Amendment bars the Agency from deciding those same issues in the permit proceeding. Petition at 43 *et seq.* This argument is little more than a variation on the separation of powers and collateral estoppel arguments discussed above, for it amounts to no more than telling the Agency that it should stay its hand because the case is now before an Article III court that is being tried before a jury. This argument is rejected for essentially the same reasons discussed earlier. For example, MSP contends that, with respect to issues on which the jury has already made findings, the Agency is bound by those findings.[49] *Id.*; Tr. at 20 (Jan. 12, 1995) (oral argument). The practical import of this contention is to give preclusive effect to the jury's findings even though the law of collateral estoppel,

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[48] Moreover, there has been no administrative review or modification of an Article III court's judgment, nor could there be, because the district court has issued no judgment in the judicial enforcement action that would foreclose the Agency from concluding that its facility is not an aggregate kiln. The one judgment which the district court entered (pertaining to the "product" made by MSP from SWP's material) is of very limited scope, and does not determine any issue respecting MSP's ultimate liability, much less foreclose the Region from deciding any of the grounds for the Region's permit decision.

[49] According to MSP, the jury found that MSP's kiln is an aggregate kiln, that MSP operates a kiln system that produces a aggregate, and that a significant percentage of the waste received by MSP undergoes a chemical reaction, so as to become inseparable by physical means, and is transformed into a "product produced for the general public's use." Petition at 44.

as discussed earlier, clearly provides that "issue preclusion" only attaches when an issue has been incorporated into a final judgment. In the present instance, the issues that are subject to jury findings have never been reduced to a final judgment; consequently, they cannot have a preclusive effect on issues pending before the Agency in the permit proceeding. We note also that neither the progress nor completion of the instant permit proceeding does anything to prevent the court case from continuing to be tried before a jury, and hence, does nothing to deprive MSP of its rights under the Seventh Amendment.[50] None of the Region's findings, nor ours, will deprive MSP in any way of its right to have the enforcement case tried before a jury. The enforcement case will move forward, before a jury, in accordance with the district court's own schedule, and subject to whatever rulings it might (or might not) make pertaining to our findings.[51]

Accordingly, for the reasons stated, MSP's Seventh Amendment claims are rejected.[52]

C. *The Bias Argument*

MSP charges that the denial of its BIF permit application constitutes a deprivation of property without due process of law because the person or persons who made the decision to deny the permit application were biased. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (An essential element of any meaningful due process hearing is an unbiased decisionmaker). Specifically, MSP charges that the ultimate decisionmaker, Dr. Allyn Davis, who is and was at all relevant times the Director of the Region's Hazardous Waste Division, and the Regional staff members who reviewed MSP's permit application prejudged the adjudicative factual issues in the case. MSP also charges that Agency personnel involved in the prosecution of the District Court action against MSP unduly influenced the Regional staff members responsible for reviewing MSP's permit application, thereby infecting the permitting staff with prosecutorial bias. For the reasons set forth below, we reject

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[50] The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

[51] It is not inconceivable to us that the district court might look upon our findings as having some evidentiary weight, or legal value, for purposes of the court proceedings. In that event, since the court proceeding is still pending, the court has the flexibility to factor our decision and findings into its rulings, including any rulings pertaining to the effect of the jury's earlier findings. In other words, it is possible for the court to address and ameliorate the effects of possibly conflicting findings.

[52] *In re Clay*, 35 F.3d 190 (5th Cir. 1994), and *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), are inapposite and do not support MSP's interpretation of the Seventh Amendment.

MSP's claims of prejudgment and bias. The evidence MSP cites in support of its claims does not come close to overcoming the presumption of honesty and integrity that attach to the actions of government personnel. We also conclude that review by the Environmental Appeals Board is an integral part of MSP's due process hearing and ensures that MSP's claims are heard by an independent body within the Agency before final Agency action is taken on MSP's permit application.

1. *Prejudgment*

Decisionmakers at administrative agencies are frequently required to perform multiple functions within the agency. For example, a decisionmaker might be called upon to participate in the investigation of the facts of a particular case, come to preliminary conclusions about the facts of the case, recommend a disposition of the case based on those conclusions, and then serve as the decisionmaker in the same case. The due process implications of such mixing of functions were discussed at length in the U.S. Supreme Court decision in *Withrow v. Larkin*, 421 U.S. 35 (1975).

In *Withrow*, Wisconsin's State Examining Board was charged with enforcing State statutes prohibiting various acts of professional misconduct by physicians. The Court held that it would not violate due process for the Board, which has the power to adjudicate charges and issue license suspensions, to investigate the conduct of a licensed physician, make findings of fact and conclusions of law that the physician had engaged in certain proscribed conduct and that there was probable cause to believe that he had violated certain criminal provisions, and then institute charges on the basis of those findings and conclusions. The Court observed that:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. * * *
>
> Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. * * *
>
> The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation.

Withrow at 56-58 (footnotes and citations omitted). The Court also described the heavy burden that must be borne by one who would claim that the mixing of investigative and adjudicative functions has worked a denial of due process:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow at 47. MSP must carry this burden if it is to demonstrate that Dr. Davis and his staff prejudged the adjudicative factual issues of this case or were infected with prosecutorial bias from the District Court enforcement action against MSP.

To show that Dr. Davis and his staff prejudged the adjudicative factual issues of this case, it is not enough for MSP to show that they formed or even expressed opinions about those issues before the hearing. Rather, in the words of the *Withrow* decision quoted above, MSP must show that Dr. Davis and his staff were "so psychologically wedded to [those opinions that they] would consciously or unconsciously avoid the appearance of having erred or changed position," and that such opinions "as a practical or legal matter foreclosed fair

and effective consideration" of the evidence presented during the permitting process. *Id* at 57-58. Put another way, MSP must show that the minds of Dr. Davis and his staff were "irrevocably closed" on the adjudicative factual issues raised by MSP's permit application. *F.T.C. v. Cement Institute*, 333 U.S. 683, 701 (1948) (no due process violation despite fact that Commission had prior to hearing indicated in reports to Congress its position on facts at issue in pending case, where the Commission's earlier investigations of the issue "did not necessarily mean that the minds of its members were irrevocably closed" on the issue and persons suffering deprivation were "legally authorized participants in the hearing"). MSP has not even come close to making the showing necessary to establish prejudgment. At most, MSP has shown that Dr. Davis and his staff formed preliminary opinions about the nature of MSP's combustion activities and its status within the RCRA regulatory scheme, as they were required to do in the course of fulfilling their statutory and regulatory obligations.

In support of its prejudgment argument, MSP relies on the transcript of a deposition of Dr. Davis taken by MSP in the District Court enforcement action.[53] During the deposition, MSP asked Dr. Davis whether he had formed opinions about the nature of MSP's combustion activities and MSP's status within the RCRA regulatory scheme. In response, Dr. Davis revealed that he and his staff had indeed formed opinions on those subjects. This revelation, however, does not mean that Dr. Davis and his staff prejudged the adjudicative issues of this case. In the first place, any opinions formed by Dr. Davis and his staff were formed in the context of an ongoing, integrated regulatory process which culminated in MSP's submission of a part B permit application. During this process, Dr. Davis and his staff were required as a part of their regulatory and statutory duties to investigate MSP's combustion activities and to form opinions concerning the status of MSP's facility within the RCRA regulatory scheme.[54] Second, the deposition

[53] Based on Dr. Davis' responses in a July 1993 deposition taken by MSP, MSP asserts that Dr. Davis and his staff prejudged the following adjudicative determinations: (1) whether MSP's rotary kiln system is an industrial furnace; (2) whether MSP produces a product for the general public's use; (3) whether MSP can demonstrate a known market or disposition for its aggregate; (4) whether MSP's aggregate undergoes a chemical reaction so as to become inseparable by physical means; and (5) whether MSP is a "sham recycler."

[54] For example, between 1985, when MSP commenced operating its combustion device, and 1991, when the BIF rule was promulgated, it was the Regional permitting staff's duty to investigate MSP's facility to determine whether it was engaged in legitimate recycling activities and thus exempt from regulation. Later, when the BIF rule was promulgated and MSP claimed entitlement to BIF interim status, it was the permitting staff's duty to investigate MSP's self-characterization as an industrial furnace entitled to BIF interim status. It also was required to investigate whether MSP was complying with the interim status standards applicable to BIFs at 40 C.F.R. § 266.103. As part of these duties, the Regional staff members investigating MSP were required to report their findings to Dr. Davis.

relied on by MSP makes clear that the opinions of Dr. Davis and his staff concerning MSP's facility are the kind of working hypotheses that form naturally and inevitably as a result of obtaining information through an investigation and that evolve with the addition of more information.[55] In other words, they are not the kind of entrenched opinions that prevent a decisionmaker from fairly assessing new information. Thus, MSP has failed to demonstrate, as it was required to do, that Dr. Davis or his staff were "so psychologically wedded to [their opinions that they] would consciously or unconsciously avoid the appearance of having erred or changed position," and that such opinions "as a practical or legal matter foreclosed fair and effective consideration" of the evidence presented during the permitting process. *Withrow, supra*, 421 U.S. at 57-58. Nor has MSP demonstrated that their minds were "irrevocably closed," in the words of the *Cement Institute* decision. Rather, the mixing of investigative functions (and the tentative opinions that form as a natural consequence of such functions) and adjudicative functions by Dr. Davis and his staff is precisely the kind of mixing of functions that was upheld as constitutionally permissible in *Withrow* and has since been approved by many courts.[56] We conclude, therefore, that MSP has not met its heavy bur-

[55] In his deposition, Dr. Davis makes clear that his opinions were based only on the investigations of his staff and he indicates that he would be receptive to any new information about MSP's facility. Petition for Review at 10 ("The letter indicates that based on the information available to us at that time, yes."); *id.* at 11 ("In 1985, when I indicated that the Agency felt Marine Shale was an incinerator, that was based on the information available at that time."); *id.* at 16 ("Again, based on briefings that I've had over the years."); *id.* at 17 ("Based on the information that was available to EPA at that time, Marine Shale was a sham recycler that required appropriate enforcement action."); *id.* at 18 ("I believe once the original determination was made, there was no new information that was significant that changed our mind. Yes, at that time we felt that Marine Shale was a sham recycler.").

[56] *See Kessel Food Market, Inc. v. National Labor Relations Board*, 868 F.2d 881, 888 (6th Cir.) (no due process problem where statutory scheme allows NLRB to first pursue an injunction against any employer to restrain further activity in violation of the Act and then decide, through the hearing process, whether the employer has violated the Act) *cert. denied*, 493 U.S. 820 (1989); *U.S. v. Batson*, 782 F.2d 1307, 1314-1315 (5th Cir.) (even assuming that the hearing officers had decided beforehand that the facts constituted a prohibited scheme or device, "there is no significant evidence to indicate that any hearing officer's mind was irrevocably closed * * *.") *cert. denied*, 477 U.S. 906 (1986); *Alabamians for a Clean Environment v. Thomas*, 1987 U.S. Dist. LEXIS 15,148, 25-26 (N.D. Ala. 1987) (in EPA RCRA permit proceedings, no impermissible bias even if Region's permit officials expressed predisposition to grant permit application before public hearing on the proposed permits). *See also Marathon Oil Company v. EPA*, 564 F.2d 1253 (9th Cir. 1977). In *Marathon*, the U.S. Court of Appeals for the Ninth Circuit considered a challenge to the impartiality of the Regional Administrator in the permitting process. The Regional Administrator made a preliminary decision on the permit, sent the permit decision to an administrative law judge for an evidentiary hearing, and then issued an initial decision after the ALJ had completed the evidentiary hearing. The Court concluded that:

> It is neither self-evident, nor have petitioners presented evidence to suggest that the review procedure here poses

Continued

den of overcoming the presumption of honesty and integrity attaching to the actions of government decisionmakers.[57] [58]

> the "unacceptable risk of bias" present in *Morrissey, Murchison* or *Tumey.* Rather, vesting the initial decision in the Regional Administrator, who after further hearings before an Administrative Law Judge reviews the matter prior to the issuance of an initial license, more nearly resembles the permissible combination of investigation and adjudication sanctioned by *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), than, for example, the situation in which a judge receives as compensation part of a fine which he levies, *Tumey v. Ohio, supra.* We see no more reason to assume that a Regional Administrator cannot objectively review his earlier decision in light of additional hearings than to assume that a federal judge cannot retry or review a case after its remand following the initial trial or review.

Id. at 1265.

[57] That Dr. Davis publicly announced his opinions in a deposition taken by MSP does not alter this conclusion. Dr. Davis was compelled to answer under oath whether he had formed opinions about MSP's combustion device. He had no choice but to reveal that, based on the reports and conclusions that he had received from his staff, he had indeed formed opinions concerning MSP's combustion activities, as he was required to do to fulfill his statutory and regulatory obligations. Unlike the F.T.C. Commissioner who gave a speech announcing his position on a pending matter in *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 590 (D.C. Cir. 1970), relied on by MSP, Dr. Davis' testimony at the deposition did not in our view have the "effect of entrenching [him] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.* For the same reason, the other "public announcement" cases cited by MSP are inapposite.

[58] MSP also points to several of Dr. Davis' actions as evidence of prejudgment, specifically: (1) his effort to solicit the concurrence of another regulatory body in the conclusion that the Dexter Leonard property posed an imminent and substantial endangerment; (2) his involvement in EPA's RCRA 3007 enforcement action against MSP relating to the Dexter Leonard property; and (3) his participation in the government's prosecution of MSP. With respect to the last of these reasons, MSP asserts that Dr. Davis initiated the investigation into the status of MSP's facility, referred the matter to Regional Counsel for possible enforcement, has cooperated with Regional Counsel and their Washington counterparts throughout the enforcement action, and has had ex parte contacts concerning the merits of the case.

Upon careful review of MSP's arguments and the Region's response to them, we conclude that Dr. Davis' involvement in the actions listed above, in itself, does not establish that Dr. Davis prejudged the adjudicative factual issues raised by MSP's permit application. At most, Dr. Davis' involvement in the actions cited above serves only to remind us that Dr. Davis was at all times relevant to this case the Director of the Hazardous Waste Management Division with oversight authority over the RCRA Enforcement Branch as well as the RCRA Permit's Branch. In order to raise a due process concern, MSP would need to show not only that Dr. Davis exercised oversight of the actions listed above, but that his oversight of these actions caused him to develop entrenched opinions concerning the adjudicative factual issues raised in the permit proceeding. MSP attempts to make such a showing with citations to the 1993 deposition discussed in the text above. For the reasons cited in the text, however, we conclude that the deposition does not support the conclusion that Dr. Davis prejudged the adjudicative factual issues of the case. We therefore conclude that, with respect to the actions listed above, MSP has not carried its heavy burden of overcoming the presumption of honesty and integrity in the actions of government decisionmakers.

2. *Involvement in the Enforcement Action*

MSP also charges that Agency personnel involved in the prosecution of the District Court action against MSP unduly influenced Regional permitting staff members responsible for reviewing MSP's permit application, thereby infecting the permitting staff with prosecutorial bias. MSP believes that the standard for determining whether enforcement personnel exerted undue influence over the Regional permitting staff may be derived from the decision of the United States Court of Appeals for the Seventh Circuit in *Bethlehem Steel Corporation v. E.P.A.*, 638 F.2d 994, 1008 (7th Cir. 1980). Because commingling of prosecutorial and adjudicative functions is only proscribed under certain circumstances, *Bethlehem Steel* provides a useful benchmark of the level of commingling that compromises the neutrality of a decisionmaker. We therefore discuss the decision at some length below.

In the *Bethlehem Steel* case, EPA's Administrator disapproved the Indiana Air Pollution Control Board's ("IAPCB") issuance to Bethlehem Steel of a delayed compliance order ("DCO"). The DCO would have extended the time in which Bethlehem Steel was required to comply with the Indiana State Implementation Plan ("SIP"). After the IAPCB issued the DCO, but before the Administrator disapproved it, EPA enforcement attorneys instituted an enforcement action against Bethlehem Steel for violations of the SIP. The EPA attorneys in charge of the enforcement proceeding were the same attorneys who were principally in charge of reviewing the DCO and recommending a disposition of the DCO to the Administrator. Bethlehem Steel challenged the disapproval of the DCO, contending that the commingling of prosecutorial and adjudicative functions in the same EPA attorneys amounted to a denial of due process. The Court agreed. The Court noted that, in addition to such commingling, the following circumstances created at least the appearance of a due process violation: (1) the timing of the DCO decision so as to gain tactical advantage in the enforcement action; (2) the attempt to require Bethlehem Steel to waive various defenses it might have had in the enforcement action as a condition of obtaining approval of the DCO; (3) the communication between enforcement attorneys and the Administrator's office after the time had passed for public comment and after the enforcement action had been filed; (4) the use of language in the Administrator's proposed and final disapprovals that was substantially identical to the language used in a memorandum written by the lead attorney engaged in the enforcement action; and (5) the Agency's refusal to disclose all of the information that was relevant to its decision. *Id.* at 1008-1010. The Court concluded that:

> [A]lthough many of these practices may not raise significant problems in normal Agency operations, we believe they do raise significant questions here where enforcement attorneys with substantial and significant input into the Administrator's decision on the DCO were, at the relevant time, engaged in litigation with Bethlehem over the same issues. These questions cast a shadow over, at least, the appearance of fairness in the Agency's review procedures utilized in this case.

Id. at 1010 (footnote omitted). Using the *Bethlehem Steel* decision as our standard for determining whether the level of commingling in this case deprived MSP of its due process rights, we conclude for the reasons set forth below that whatever minimal commingling of prosecutorial and adjudicative functions took place in this case, it is insignificant compared to the commingling that the Court found in *Bethlehem Steel.*

As evidence of such commingling in this case, MSP cites the following: (1) *After* the tentative decision to deny the permit was made, the Regional permitting staff received assistance in drafting the Statement of Basis from Steven Silverman, who had testified in the District Court action as an expert on the sham recycling criteria, and from Terry Sykes, who at various times was part of the staff in the enforcement action; and (2) William Honker, who directed the Regional permitting staff responsible for reviewing MSP's application, sent enforcement personnel a memorandum asking for "any information or analysis of information" available concerning the issues raised in the permit proceeding. For the following reasons, however, we do not believe that this evidence supports a conclusion of improper or undue commingling of prosecutorial and adjudicative functions under the standard set forth in *Bethlehem Steel.*

After the proposed decision to deny the permit had been made, the Statement of Basis embodying the decision was sent to Steven Silverman and Brian Grant of the Agency's Office of the General Counsel ("OGC") so that they could review and "finalize" the document. MSP believes that this was inappropriate because Steven Silverman was "intimately involved" in the enforcement action. We reject this conclusion. Mr. Silverman was never part of the staff that is prosecuting the enforcement action.[59] His role in the District Court action was limited to testifying as an expert on legal issues surrounding the sham

[59] The Steven Silverman who helped draft the Statement of Basis for the Proposed Denial is *not* the same Steven Silverman who works for the Department of Justice and who is prosecuting the enforcement action against MSP. MSP may have originally confused the two.

recycling criteria. Region's Response to Petition at 73. Giving expert testimony on legal issues at a trial, in our view, hardly counts as "intimate involvement." In light of Mr. Silverman's limited involvement in the enforcement action, it does not strike us as inappropriate for the Region to refer the Statement of Basis to him and Brian Grant for finalizing. The document contained an extensive legal analysis involving the sham recycling criteria, and Mr. Silverman is a recognized expert in that area within OGC. One of the functions of OGC is to review Regional decisions for the soundness of the legal analysis in those decisions. Compared to the commingling found in *Bethlehem Steel*, we find that Mr. Silverman's role in finalizing the drafting of the Statement of Basis is of little consequence for due process purposes.

Terry Sykes' involvement in the enforcement action was more extensive than Mr. Silverman's, although the fact that Ms. Sykes resigned from the staff of the enforcement action, at least for a time, suggests that she did not play a leading role in that action. Despite her involvement in the enforcement action, the Region allowed Ms. Sykes to assist Elaine Taylor, a Regional staff attorney, in drafting the Statement of Basis for the proposed denial. Elaine Taylor explains in her affidavit that Ms. Sykes was called in to perform this task *after* the decision was made to issue a proposed denial of MSP's permit application. Ms. Taylor also explains that the task of drafting the Statement of Basis had been assigned to a Regional attorney, Hortense Haynes, but Ms. Haynes resigned from the case for health reasons. (Declaration of Elaine Taylor at 5.) Rather than assign the task to another member of the Regional permitting staff, the task was assigned to Ms. Sykes because of the complexity of the legal issues, the limited personnel resources available to the Region, and the short time frame involved. (Declaration of Elaine Taylor at 5.) Ms. Taylor also asserts that Ms. Sykes had resigned from the enforcement staff several months before she assisted in drafting the Statement of Basis (Declaration of Elaine Taylor at 5), although she may have had sporadic involvement in the case both several weeks before and several weeks after drafting the Statement of Basis. Region's Reply Brief at 13-14.

The record suggests that the Region was sensitive to the possibility of improper commingling of prosecutorial and adjudicative functions in this case, and therefore took great pains to maintain a wall of separation between the enforcement action and the permit proceeding. (Declaration of William K. Honker; Declaration of Allyn M. Davis.) In view of Ms. Sykes' involvement in the enforcement action, however, Ms. Sykes' role in drafting the Statement of Basis represents a significant breach in the Region's efforts. Given her involvement in the enforcement action, the decision to allow Ms. Sykes to assist in drafting

the Statement of Basis was, in our view, a mistake in judgment, albeit an understandable mistake in light of the staffing problems that unexpectedly arose when Hortense Haynes resigned from the case. Nevertheless, we do not share MSP's view that the breach has constitutional implications.

It is important to keep Ms. Sykes' involvement in the permit proceeding in perspective. The record supports the conclusion that Ms. Sykes neither recommended nor made the decision to deny the permit application. (Declaration of Elaine Taylor at 5.) Ms. Sykes was called in to assist in the drafting of the Statement of Basis only *after* the decision to deny the permit had been made. *Id.* It appears that Ms. Sykes' role was akin to that of a law clerk who drafts a decision for a Judge according to instructions that dictate both the result to be reached and the rationale for reaching it. (Declaration of Elaine Taylor at 5.) We conclude, therefore, that Ms. Sykes did not have a "substantial and significant input" into Dr. Davis' decision to deny MSP's permit, in the words of the *Bethlehem Steel* decision.

It is also important to remember that, as matter of law, "a certain amount of commingling [between EPA adjudicative and EPA prosecutorial functions] is normal and acceptable." *United States v. National Steel Corp.*, 767 F.2d 1176, 1182 (6th Cir. 1985) (no due process violation where EPA personnel responsible for enforcing Clean Air Act consent decree interacted on a limited basis with EPA personnel responsible for adjudicating National Steel's application for an alternate emission reduction option that would have allowed National Steel to avoid meeting certain requirements of consent decree). The Region's effort to maintain a strict separation between the enforcement action and the permit proceeding appears to have gone further than the law requires. A deviation from the Region's strict program of separation, therefore, does not necessarily rise to the level of a constitutional violation. Ms. Sykes' role in drafting the Statement of Basis is, in our view, the only real breach in an otherwise successful effort to maintain this strict separation. The Region should not be punished for falling short of a self-imposed standard of separation that is actually more strict that the Constitution requires.

As evidence of improper commingling of prosecutorial and adjudicative functions, MSP also cites the memorandum from William Honker, asking enforcement attorneys to provide "any information or analysis of information" they possessed on the issues raised by MSP's permit application. MSP treats this memorandum as a "smoking gun," arguing that it is obviously a coded message inviting enforcement attorneys to tell the permitting staff how to decide MSP's permit appli-

cation. We reject MSP's interpretation as pure speculation. A far more plausible reading of the memorandum is that Mr. Honker simply wanted to obtain any information generated by the enforcement staff that might be relevant to the permit proceeding. Because some of the issues in the enforcement action are similar to those in the permit proceeding (almost identical, according to MSP), some minimal level of commingling was inevitable if only to allow the permitting staff to gain physical access to relevant information previously generated in connection with the enforcement action.

In sum, using the *Bethlehem Steel* standard endorsed by MSP, we conclude that whatever commingling between prosecutorial and adjudicative functions occurred in this case, the level of such commingling was minimal and thus did not begin to approach the level of commingling found in *Bethlehem Steel.* Although the Region committed an error in judgment when it allowed Ms. Sykes' to assist in drafting the Statement of Basis, nothing in the record suggests that she or any other member of the enforcement staff had a "substantial and significant input" into the decision to deny MSP's permit application. We conclude, therefore, that MSP has failed to carry its heavy burden of overcoming the presumption of honesty and integrity that attaches to the actions of government decisionmakers.[60]

3. *The Role of the Environmental Appeals Board*

In assessing whether these permit proceedings meet the dictates of due process, the role of the Environmental Appeals Board must also be considered. The Region's consideration of MSP's part B permit application is merely one stage in an integrated permitting process that did not end with the issuance of the Regional decision that is now on review. Because MSP appealed the Region's decision, the decision

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[60] MSP also makes much of the fact that the Statement of Basis for the proposed denial is almost identical to the Statement of Basis for the final permit decision. MSP believes that the similarity between the two documents means that the Region did not consider the information submitted to it during the comment period. In support of this assertion, MSP points out that the final Statement of Basis cites only information from the trial that supports the Region's decision. We reject this argument for several reasons. First, as its name suggests, a Statement of Basis is meant to communicate the information that the Region relied on in making its decision. Because the Region was not persuaded by the materials that MSP submitted, it did not rely on those materials and they naturally did not form the basis of the Region's decision. Second, the response to comments is the document that is meant to contain the Region's response to information that it did not rely on to make its decision. The Region did respond to MSP's materials in its Response to Comments. Finally, in view of the fact that MSP submitted as its comments reams of undigested trial transcripts, without highlighting significant parts or explaining its reasons for submitting the materials, it is not immediately obvious to us that the Region was even required to respond to MSP's materials. That it actually waded through those materials and responded to them at all is compelling evidence of the Region's good faith effort to give fair consideration to MSP's arguments.

did not constitute final agency action.[61] Consequently, the Board's review is the final stage of the permitting process and is integral to MSP's due process hearing.[62] The Board is not part of any other office in the Agency and answers only to the Administrator of the Agency.[63] In addition, the Board has devoted considerable time and effort to this case and has given careful and independent review to the record that was before the regional staff, including transcripts of the expert testimony that serves as the linchpin of each side's argument. As a consequence, the Board has been able to consider MSP's contentions without any Regional filtering. The transcripts and studies that form the factual basis of both the Region's and MSP's reports were presented to the Board without any abridgement. Further, the Board has had the benefit of oral argument and voluminous briefing from the parties. It is based on this independent assessment of the record that the Board finds itself in agreement with the Region's conclusion that MSP does not function as an aggregate kiln within the meaning of § 260.10. The

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[61] Where the decision of the Region is appealed to the Board, the Region's decision does not become final agency action, unless the Board denies review. 40 C.F.R. § 124.19(c). *Cf. Puerto Rico Aqueduct and Sewer Authority v. E.P.A.*, Slip op. 93-2340, at 3, n.3 (1st Cir. 1994) (With respect to NPDES permits, "the initial decision [of the Region] constitutes final agency action only when the Board denies review or summarily affirms, *see* 40 C.F.R. § 124.91(f) (1993), not where, as here, the Board writes a full opinion * * *.").

[62] *See Alabamians for a Clean Environment v. Thomas*, 1987 U.S. Dist. LEXIS 15148 (N.D. Ala. 1987). In *Alabamians*, EPA and the State of Alabama jointly issued a RCRA permit. After the two agencies had made their final decisions to grant the permit, citizens groups appealed, arguing among other things that their due process rights had been infringed because some of the EPA staff had made statements before the public hearing to the effect that they were predisposed to grant the permit. The citizens groups argued that such statements reflected prejudgment and bias. The Court rejected the attack as premature because the citizens groups had not exhausted their administrative remedies. The Court observed that

> The plaintiffs due process attacks focus on whether the consideration of the permits was improper. However, neither agency's consideration is final at this time. The procedures which remain under RCRA and the Alabama Environmental Management Act are part of the process by which an interested person may have the permit decisions scrutinized. To allow the plaintiff's to attack the agencies' permit consideration on grounds that such consideration is biased or inadequate before the process of consideration is complete would be unnecessarily speculative.

Id. at 23. The Court's observation suggests that the appellate process is an integral part of the permitting process and that the adequacy of a due process hearing cannot be judged until the Agency's appellate procedures have run their course.

[63] *See* 40 C.F.R. § 1.25(e); 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992) ("Another virtue of the [newly created] Board is that it will make clear that the Administrator's enforcement authority (delegated to various Regional and Headquarters enforcement officers) and the Administrator's adjudicative authority are delegated to, and exercised by, separate and distinct components of the Agency, thus inspiring confidence in the fairness of Agency adjudications.").

Board's involvement in this case ensures that MSP's claims have been fairly heard and carefully considered by an independent component of the Agency. In keeping with established principles of due process, this hearing has taken place *before* final Agency action on MSP's permit application. In view of the Board's involvement, we believe that MSP simply has no basis for arguing that its contentions supporting issuance of a BIF permit were not fairly heard and considered by an impartial decisionmaker.

III. *CONCLUSION*

For the reasons stated above, the Region's decision to deny MSP's BIF permit application is affirmed and this matter is remanded so that the Region can issue a final permit denial.[64] The basis for this affirmance is the Region's conclusion that MSP's facility does not produce aggregate and therefore does not meet the industrial furnace definition. We recognize that the Region based its decision on other grounds as well, and to the extent we have not ruled on those other grounds, nothing in this decision should be construed as preventing the Region from basing its final permit decision on these other grounds. An appeal to the Board from the Region's final permit denial will not be

[64] As a separate basis for its permit decision, the Region also denied MSP's permit application because it believes that MSP cannot be counted on to comply with the terms and conditions of a RCRA operating permit, given MSP's record of noncompliance with environmental statutes, regulations, and permits. As authority for denying the permit on this basis, the Region cites the so-called "omnibus clause" at section 3005(c)(3) of RCRA, 42 U.S.C. § 6925(c)(3). That section provides in pertinent part that: "Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." Although the language of the provision does not appear to contemplate denials of permits, the Agency has traditionally read the provision as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the environment. 50 Fed. Reg. 28,723 (July 15, 1985) ("The Agency believes that the authority to issue permits containing conditions deemed necessary to protect human health and the environment must encompass the authority to deny permits where necessary to afford such protection."); *In re Ecolotec, Inc.*, RCRA Appeal No. 87-14 (Adm'r, Dec. 14, 1988)(same). Such authority clearly extends at least to situations where protection of human health and the environment cannot be ensured *even if the permit is complied with.* In other words, if *compliance with* a permit cannot ensure protection of human health and the environment no matter what conditions or terms are put into the permit, then the Agency has authority under the omnibus clause to deny the permit. In this case, however, the Region would extend the authority to deny permits even to those situations where compliance with the conditions and terms of the permit *would* ensure protection of human health and the environment. It is not immediately obvious to us, however, that the Agency's authority to deny permits under the omnibus clause extends to such situations. In any event, we need not definitively resolve this issue now, since we are upholding the Region's denial on another ground.

necessary to exhaust administrative remedies. *See* 40 C.F.R. § 124.19(f)(1).

So ordered.[65]

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[65] The parties have filed several motions on which the Board has not yet ruled. The Board now rules as follows: 1) the *Motion of Marine Shale Processors, Inc. to Supplement the Record on Appeal With the Attached Exhibits* (October 20, 1994) and *Motion of Petitioner Marine Shale Processors, Inc. to Supplement the Administrative Record on Appeal* (November 1, 1994), are granted. The supplemental exhibits accompanying these motions were reviewed prior to issuance today's decision; 2) the *Expedited Motion of Petitioner Marine Shale Processors, Inc. for Discovery Regarding Decisionmaker Bias in Region VI's Denial of MSP's BIF Application* (October 28, 1994) is denied. As it is now clear who was involved in the permitting decisions affecting MSP's facility, any such discovery is unnecessary; 3) the *Motion and Incorporated Memorandum of Marine Shale Processors, Inc. to Include Newly Discovered Evidence in the Administrative Record* (December 20, 1994) is granted and the attached memorandum from William K. Honker, Chief of the RCRA Permits Branch to Randy Brown, Chief RCRA Enforcement Branch, has been reviewed prior to reaching today's decision; 4) the *Petition of Marine Shale Processors, Inc. for Review of Denial of Request for Evidentiary Hearing and Motion to Consolidate with RCRA Appeal 94-12* ("Request for Evidentiary Hearing") (November 18, 1994) is denied. Following the Region's final decision denying MSP's BIF permit application, MSP sought an evidentiary hearing to the extent the denial was based on MSP's alleged prior non-compliance with various federal and State environmental statutes. The petition states that the Region's failure to respond to this request within thirty days constituted a *de facto* denial of the request from which MSP seeks review by the Board. *Request for Evidentiary Hearing*, at 3. The Region officially denied MSP's request for an evidentiary hearing on December 8, 1994. As today's decision affirms the Region's permit denial on the ground that MSP's facility is not an aggregate kiln and thus does not meet the definition of industrial furnace at 40 C.F.R. § 260.10, the issue upon which MSP seeks an evidentiary hearing is now moot. *See supra* note 64. MSP's *Request for Evidentiary Hearing* is therefore denied; 5) the Region's *Motion to Lodge Document with the Board*, (Feb. 16, 1995) is denied. The Region seeks to file with the Board a Federal Register Notice extending the time period for comment on a proposed rule relating to placement of slags derived from treatment of hazardous wastes K062 and F006 (59 Fed. Reg. 67,256 (Dec. 29, 1994)). As this notice is not relevant to the issue before us, the Region's motion is denied; and 6) the following motions are granted and the accompanying submissions have been reviewed: *Motion of the United States Environmental Protection Agency to File a Corrected Response*, (November 25, 1994), *Motion of Marine Shale Processors, Inc. for Leave to File a Reply Memorandum in Support of its Petition for Review of BIF Permit Denial* (December 5, 1994), *EPA's Request for Leave to Respond to MSP's Reply Memorandum* (December 20, 1994); *Marine Shale Processors, Inc.'s [Request to File] Response to the Region's Letter Memoranda and Davis Affidavit*, (January 6, 1995), *[Marine Shale Processor's Request to Submit] Post-Hearing Memorandum*, (January 17, 1995), *[Region VI's Request to Submit] Response to Petitioner's Post-Hearing Memorandum and to Issues Raised at Oral Argument*, (January 23, 1995), and *MSP's [Request] to Reply to Region VI's Response to MSP's Post-Hearing Memorandum* (January 27, 1995).