# IN RE ALLIED-SIGNAL INC.

RCRA Appeal No. 92-30

***ORDER DENYING REVIEW***

Decided May 16, 1994

Syllabus

Allied-Signal Inc. seeks review of a permit issued to it by EPA Region II under the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* The challenged permit provisions require Allied to perform a RCRA Facility Investigation for two Solid Waste Management Units identified at its Elizabeth, New Jersey manufacturing facility, and to perform soil sampling and analysis for four other SWMUs and four "areas of concern" at the facility to determine whether an RFI is necessary for those units. Allied contends that it has already performed (and continues to perform) substantial investigative work required by State law and by State-issued permits, and that the HSWA permit's investigative requirements are improper because they may involve unnecessary and costly repetition. In addition, Allied contends that the HSWA permit's dispute resolution provisions are inadequate to satisfy the minimum requirements of procedural due process, because the provisions do not state that Allied may obtain immediate judicial review in the event of an unfavorable resolution.

Held: The HSWA permit adequately addresses Allied's concern over potentially duplicative investigative requirements. The permit clearly indicates the Region's willingness to consider work performed by Allied for the State, and to evaluate whether that work satisfies some or all of Allied's corrective action obligations under HSWA. Indeed, the administrative record demonstrates that the Region has already relied on Allied's State-approved closure of several SWMUs at the Elizabeth facility as evidence of HSWA compliance. With respect to dispute resolution, Allied's permit already contains all of the procedural safeguards that the Board's previous decisions deem necessary in this context; immediate recourse to judicial review is neither required as a matter of due process nor advisable as a matter of policy. The Petition for Review is therefore denied.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge McCallum:***

## I. *BACKGROUND*

Petitioner Allied-Signal Inc. (Allied) seeks review of a permit issued to it by EPA Region II pursuant to the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* (RCRA), for Allied's Elizabeth,

New Jersey manufacturing plant.[1] In its Petition for Review, Allied contends that: (1) based on the results of previous environmental investigations, Allied should not be required to perform a RCRA Facility Investigation with respect to any of the Solid Waste Management Units or areas of concern identified in the HSWA permit; and (2) the HSWA permit's dispute resolution provisions are inadequate to satisfy the minimum requirements of procedural due process.[2]

## II. *DISCUSSION*

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that the Board's power of review should be exercised "sparingly," and that "most permit conditions should be finally determined at the Regional level." *Id.* The petitioner bears the burden of demonstrating that review should be granted. *See In re Laidlaw Environmental Services*, RCRA Appeal No. 92-20, at 8 (EAB, Oct. 26, 1993).

### A. *The RCRA Facility Investigation*

Allied sold a portion of the Elizabeth facility to another company during 1986, triggering a requirement, under then-existing provisions of New Jersey law,[3] for Allied to conduct an environmental investigation of the entire facility. Allied contends that the performance of that investigation, portions of which are ongoing, has eliminated any need for a separate "RCRA Facility Investigation" to be performed as part of the course of corrective action[4] that will be initiated under the terms of Allied's HSWA permit.

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[1] The overall RCRA permit for the facility consists of the HSWA permit issued by Region II and a December 31, 1990 Hazardous Waste Facility permit issued by the State of New Jersey, an authorized State pursuant to RCRA section 3006(b).

[2] In the Petition for Review, Allied also claims that the HSWA permit ought to provide for Region II, rather than Allied, to determine the existence and identity of any hitherto unidentified areas of concern at the facility (based on studies to be conducted by Allied). During the pendency of this appeal, Region II has agreed to revise the permit provision to which that objection pertains, and to undertake the identification of additional areas of concern as requested by Allied. Allied's request for review of that objection is therefore denied as moot.

[3] The Environmental Cleanup Responsibility Act, N.J. Stat. Ann. §§ 13:1K-6 through -14 (ECRA). This statute was extensively amended during 1993 (*see* 1993 N.J. Laws 139), and is now known as the Industrial Site Recovery Act.

Allied's permit contains a useful general summary of the role of a RCRA Facility Investigation in the corrective action process:

> The purpose of the RFI is to determine the nature, extent, and rate of migration of hazardous wastes or hazardous constituents in soils, groundwater, surface water, subsurface gas and/or air. Based on these multimedia analyses, the types of contaminants present, the boundaries of any contamination (e.g., plumes), and the rate of contaminant movement can be determined. Once these analyses are reviewed, a * * * report is prepared that provides a summation of the data and recommendations for any needed corrective action.

Permit § III.A.2, at 2. The RFI obligations actually imposed by Allied's permit are, however, significantly narrower than that general description would suggest.

The permit directs Allied to undertake a "full RFI"—including submission and implementation of an RFI work plan, and preparation of an RFI report—for only two Solid Waste Management Units at the Elizabeth facility, and only for the two media (soil and groundwater) into which there "has been a documented release of hazardous waste and/or hazardous constituents" from those units. Permit § II.A.3, at 6. The two units, referred to in the permit as SWMUs 15 and 16, are settling ponds that were utilized in connection with Allied's manufacture of monochlorodifluoromethane products (identified in the permit as "Refrigerant 22" and "Genetron 22") at the Elizabeth plant. According to the RCRA Facility Assessment report for the plant, groundwater sampling in the vicinity of the two ponds has indicated that elevated levels of two volatile organic substances, methylene chloride and dichlorodifluoromethane, are present.

With respect to four other Solid Waste Management Units and four areas of concern—referred to in the permit as SWMUs 7, 12, 13, 14, 17, 18, 19, and 20—the permit will initially require only a limited soil sampling and analysis procedure to assist in determining whether a full RFI is warranted, *i.e.*, whether "releases have occurred or whether there exists the potential for a release of hazardous waste and/or haz-

[4] RCRA section 3004(u), 42 U.S.C. § 6924(u), provides that hazardous waste treatment, storage, or disposal permits issued after November 8, 1984 must require the facility owner to undertake "corrective action for all releases of hazardous waste or constituents from any solid waste management unit * * *, regardless of the time at which waste was placed in such unit." *See also* 40 C.F.R. § 264.101.

ardous constituents" from the eight locations in question. Permit § III.A.3, at 6. These locations include:

1. A "drum storage area" used primarily to store caustic salts and coated plastic rings. According to the RFA report, the results of previous soil sampling in this area indicate that elevated petroleum hydrocarbon levels are present.

2. A "backfilled unlined lagoon" used for neutralization of acidic wastes. According to the RFA report, no soil contamination has been identified at this location. Because the unit is unlined, however, the RFA report recommends additional soil sampling and analysis to determine whether a release from this unit has occurred or is likely to occur.

3-4. Two "unlined drainage ditches" used for neutralization of acidic wastes. According to the RFA report, soil sampling at these locations has identified elevated levels of arsenic, antimony, chromium, copper, zinc, polychlorinated biphenyls, and four volatile organic compounds.

5-8. The former fluoroisobutylmonomer and sulfuric acid production areas, the former "genetron process and tank farm" area, and the (still operating) fluoropolymer production area. According to the RFA report, elevated levels of several metals (including mercury), of polychlorinated biphenyls, and of petroleum hydrocarbons have been detected in soil samples taken from these locations.

It is Allied's contention that no further investigation of any kind should be required for any of the ten SWMUs and areas of concern that would require such investigation under the terms of the final HSWA permit. Allied took the same position when the permit was originally issued in draft form during February 1992. At that time Region II pro-

posed to require further investigation of the ten locations identified above and of six additional locations (empty aboveground waste storage tanks referred to in the draft permit as SWMUs 1, 2, 3, 4, 5, and 6) that the RFA report, which was completed during December 1990, had been unable to exclude as possible sources of soil contamination. Citing the same environmental studies on which it continues to rely in its Petition for Review, Allied asserted, in comments on the draft permit, that those studies had already eliminated any need for further investigation at the site. The Region accepted Allied's contention with respect to SWMUs 1 through 6—noting that the State of New Jersey had already certified those units as having been closed pursuant to a State-approved closure plan—but rejected the contention with respect to the remaining SWMUs and areas of concern for which additional investigation was proposed, and which are now the focus of Allied's appeal:

> Comment: Allied believes that on the basis of the reports submitted by Geraghty & Miller [the firm retained to perform Allied's ECRA investigation], no further action should be required for all the listed SWMU's and [areas of concern]. We request the Further Investigations section [Permit § III.A.3] be deleted.
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> Response: The request is denied. However, the permit will be modified to require no further action for SWMUs 1 through 6. The reports submitted by Geraghty & Miller showed that SWMUs 1 through 6 were certified closed in 1991 pursuant to [an] NJDEPE approved closure plan and therefore, require no further action. SWMU[ ] 7, and SWMUs 12 through 20 will require further action pending NJDEPE and EPA approval of no further action at these units.
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> EPA acknowledges that substantial cleanup activities are being performed pursuant to the NJDEPE ECRA program. EPA has evaluated and approved work previously completed under the NJDEPE [Administrative Consent Order]. After issuance of the permit, EPA will review investigation and remediation determinations with NJDEPE. If necessary, any additional work required under HSWA or the [Administrative Consent Order] will be defined.

EPA Response to Allied's Comments, at 5-6 (June 29, 1992).

On appeal, Allied argues that despite the Region's stated intention to review future investigation and remediation decisions with State authorities, and despite the Region's acceptance of New Jersey's closure determination for SWMUs 1 through 6, Allied nonetheless "could be required to *repeat* investigative activities that could be enormously costly and to develop, unnecessarily, alternative corrective measures for SWMUs and [areas of concern] that have already been the subject of extensive study and investigation." Petition for Review, at 5 (emphasis in original). We have consistently held, however, that concerns over the possibility of future corrective action obligations that might duplicate work already performed pursuant to State-law requirements (or the requirements of State-issued permits or enforcement orders) do not require that we review or invalidate a HSWA permit. *See In re Metalworking Lubricants Company*, RCRA Appeal No. 93-4, at 6 (EAB, March 21, 1994); *In re Beazer East, Inc. and Koppers Industries, Inc.*, RCRA Appeal No. 91-25, at 9-10 (EAB, March 18, 1993); *In re General Motors Corporation*, RCRA Appeal Nos. 90-24 & 90-25, at 8-9 (EAB, Nov. 6, 1992). At the permit-issuance stage, such concerns are adequately addressed simply by acknowledging that the permittee may attempt to establish the sufficiency of work done for the State "as a means of at least partially satisfying its [HSWA] permit obligations." *Metalworking Lubricants*, RCRA Appeal No. 93-4, at 6.

Here, the Regional office has been amply responsive to the permittee's concerns over potential duplication. Region II has eliminated any corrective action requirement for SWMUs 1 through 6 at the Allied facility, based solely on the State's closure determination with respect to those units. And the Region has made clear that it will similarly consider (with respect to other SWMUs and areas of concern not yet addressed to the State's satisfaction) the investigative and remedial work that Allied continues to perform under applicable State statutes, State permits and State enforcement orders, and will evaluate whether that work satisfies some or all of the HSWA permit's corrective action requirements.[5]

To be sure, the Region has not unequivocally committed itself to embrace, for HSWA purposes, any and all future determinations by the State relating to the adequacy of Allied's work at this site under other

[5] Allied suggests that the Region has actually refused to examine the various reports of investigation prepared by Allied's consultant "to satisfy the requirements of ECRA, RCRA, and NJPDES." Petition for Review, at 5. That is quite obviously not true, as demonstrated by the comment and response quoted in the text wherein the Region, among other things, adopts the State's closure determination for SWMUs 1 through 6 (reported in the very documents that the Region is now alleged to have ignored) as evidence of Allied's satisfaction of its HSWA corrective action requirements for those units.

regulatory programs. But such a commitment would plainly not be appropriate: New Jersey is not authorized to administer HSWA, and New Jersey's activities with respect to this site under its own regulatory programs do not relieve EPA of the responsibility to ensure compliance with HSWA. *See In re General Electric Company,* RCRA Appeal No. 91-7, at 8 (EAB, Nov. 6, 1992) (Agency policy favors coordination of EPA corrective action efforts with related State efforts, but EPA retains ultimate responsibility for HSWA implementation in a State that lacks HSWA authority). The Region has sufficiently demonstrated its intention to "take full advantage of [State-ordered] work to avoid unnecessary duplication,"[6] and we therefore decline to review the permit provisions calling for further investigation of SWMUs 7 and 12 through 20.

B. *Dispute Resolution*

As we have observed in several recent appeals (one of which concerned another Allied facility[7]), HSWA permits frequently outline the permittee's corrective action obligations only in general terms because, "at the time the permit is issued, the extent and nature of the contamination at the facility and the most effective ways of cleaning up the contamination are not fully known." *In re General Electric Company*, RCRA Appeal No. 91-7, at 3 (EAB, April 13, 1993). Under Allied's HSWA permit, the details of corrective action will emerge from a process in which Allied proposes various investigative measures, performs the necessary investigations, and ultimately prepares a comparative evaluation of alternative strategies for cleaning up the site. When Allied completes that evaluation, Region II will select from among the remedial options and will formally modify the HSWA permit pursuant to 40 C.F.R. § 270.41 to incorporate the chosen remedial measures. Permit § III.E.8.

During the earlier, investigative phases of the corrective action process, the permit will not require Region II to initiate formal permit modification proceedings in order to implement its decisions regarding the scope of Allied's investigations. Rather, the various investigative plans, reports, and schedules prepared by Allied will be subject to revision by the Region, and will be incorporated—as revised—into the HSWA permit as enforceable permit requirements:

> All plans, reports and schedules required by the terms of this Permit are, upon approval by EPA, except as otherwise noted in this Permit where approval is not

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[6] *General Motors Corp.*, RCRA Appeal Nos. 90-24 & 90-25, at 8.

[7] *In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27 (EAB, July 29, 1993).

> required, incorporated by reference into this Permit. Upon incorporation, the provisions of each such document shall be binding upon Permittee and have the same legal force and effect as the requirements of this Permit.
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> Permittee shall submit draft plans and reports required by this Permit to EPA for review and comment. Unless otherwise specified, EPA shall review any plan, report, specification or schedule submitted pursuant to, or required by this Permit, and provide its written approval/disapproval, comments and/or modifications to the Permittee. Unless otherwise specified by EPA, the Permittee shall submit a revised proposal within thirty (30) days of its receipt of EPA's written comments and/or modifications. *Any such revised proposal submitted by the Permittee shall incorporate EPA's comments and/or modifications. EPA will then approve the revised proposal or modify the proposal and approve it with any such modifications. The revised proposal, as approved by EPA, shall become final.* All final approvals shall be given to the Permittee in writing.

Permit § I.D (emphasis added).

So that Allied may contest any EPA-mandated revisions to which it objects, the permit contains a series of dispute resolution provisions that entitle Allied to obtain written decisions on its objections from the Regional permitting staff and ultimately (if Allied should choose to proceed that far) from the Region's Air and Waste Management Division Director, who is the official responsible for issuing the original HSWA permit. The dispute resolution mechanism[8] includes the following steps:

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[8]The dispute resolution provisions appear at Permit § I.M, which states, in full:

> 1. The Permittee shall use its best efforts to informally and in good faith resolve all disputes or differences of opinion. If, however, disputes arise concerning submissions required under this Permit, including, but not limited to, implementation of any plans, approval of documents, scheduling of any of the work, selection, performance or completion of any corrective action, or any other obligation required under this Permit, the Permittee shall notify EPA immediately of such disputes and, within thirty (30) days of notification, the Permittee shall submit a written statement to the EPA, that argues its position. The written arguments shall set forth the Permittee's specific points of contention; the Permittee's position and reason for its

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> (a) Allied notifies the Region of any objection and, within thirty days after such notification, argues its position to the Region in a written statement.
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> (b) The Region issues a written decision within 60 days after receipt of Allied's written argument.
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> (c) If dissatisfied with that decision, Allied may request a conference with the Air and Waste Management Division Director for Region II, "for the purpose of discussing [Allied's] objections and the reasons for EPA's determination."
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> (d) After the conference, the Air and Waste Management Division Director issues her or his own written decision with respect to the matter in dispute. "Such decision shall be the resolution of the dispute and shall be implemented immediately by Permittee."

Allied contends that this dispute resolution mechanism is deficient as a matter of constitutional due process, because the Division Director's decision regarding a disputed permit revision is not immediately reviewable by a court. "[T]he Agency," Allied states, "has in effect retained a right to unilaterally and *finally* determine the scope of Allied-Signal's obligations under the final HSWA permit without recourse to judicial review." Petition for Review, at 10 (emphasis in original).

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> position; and any additional matters that the Permittee considers necessary or relevant for the EPA's determination. If the dispute cannot be resolved informally within sixty (60) days of EPA receipt of the written argument, EPA will provide the Permittee its written decision on the dispute.
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> 2. If Permittee objects to any such determination, Permittee shall notify in writing within ten (10) days of its objection and may request the Director, Air and Waste Management Division, EPA Region II to convene an informal conference for the purpose of discussing Permittee's objections and the reasons for EPA's determination. After this conference, the Director shall state in writing his decision. Such decision shall be the resolution of the dispute and shall be implemented immediately by Permittee.
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> 3. The EPA will extend the schedule for performing any elements of work materially affected by the good faith invocation of the dispute resolution process pursuant to this section (Module I M.1) to allow time for the EPA decision regarding the disputed matter.

Our previous decisions make clear that, in our view, immediate recourse to the courts is not required as a matter of due process in these circumstances. It is sufficient that the dispute resolution mechanism will provide Allied with an opportunity for an administrative hearing before it is expected to undertake the additional studies or investigations contemplated by a disputed permit revision:

> We do not believe that the Agency is required by due process to provide in the permit that the Region's decision will constitute final agency action. * * * [W]e are convinced that the combination of a hearing before the Agency followed by the opportunity for judicial review at the enforcement stage of the proceedings is all that due process requires.

*General Electric* at 25, 27. *See also In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 6 (EAB, Nov. 23, 1993); *Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 7. Moreover, the most consequential decisions to be made under the permit—those that will determine which, if any, corrective measures must be implemented at Allied's facility—will be made in accordance with formal permit modification procedures, with their attendant opportunity for further review beyond the EPA Regional level. Allied's challenge to the dispute resolution provisions of its permit on constitutional due process grounds is therefore rejected.

## **III.** *CONCLUSION*

For the foregoing reasons, the Petition for Review is denied.

So ordered.