176

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 CHESTNUT BUILDING
PHILADELPHIA, PENNSYLVANIA 19107

IN THE MATTER OF:	:	Docket No. RCRA-III-080-CA
Wheeling-Pittsburgh Steel	:	
Corporation	:	Proceeding Under Section
Follansbee, West Virginia	:	3008(h) of the Resource
	:	Conservation and Recovery
EPA I.D. No. WVD004319539,	:	Act, as amended, 42 U.S.C.
	:	§ 6928(h)
RESPONDENT	:	

FINAL DECISION

This Final Decision is part of an Environmental Protection Agency (EPA) administrative proceeding under Section 3008(h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(h). This section of RCRA authorizes EPA to issue administrative orders requiring corrective action or other response actions deemed necessary to protect human health or the environment whenever EPA determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), relating to interim status permits for the treatment, storage and disposal of hazardous wastes. Under Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), if the person named in such an order requests a hearing in a timely fashion, EPA must conduct a public hearing promptly before the order may become effective. EPA

regulations codified at 40 C.F.R. Part 24 govern procedural aspects of the proceeding.

1. REGULATORY BACKGROUND

Under RCRA, each owner or operator of a hazardous waste treatment, storage or disposal facility must obtain a permit. RCRA § 3005, 42 U.S.C. § 6925. Permits are issued only after a determination that the facility is in compliance with applicable standards and requirements. RCRA §§ 3004, 3005, 42 U.S.C. §§ 6924, 6925. States may administer the RCRA hazardous waste program following EPA authorization under RCRA § 3006, 42 U.S.C. § 6926.

RCRA authorizes certain existing facilities that entered the permit process to continue operation as "interim status facilities" pending issuance or denial of their permits, provided they notify EPA of their operations and comply with applicable statutory and regulatory requirements. RCRA § 3005(e), 42 U.S.C. § 6925(e).

EPA has authority to require corrective action at permitted facilities under RCRA § 3004(u), 42 U.S.C.§ 6924(u), and at interim status facilities under RCRA § 3008(h), 42 U.S.C. § 6928(h), the provision invoked in this action. That section provides:

> (1) Whenever on the basis of any information the Administrator determines that there is or has been a

release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment...

The purpose of this provision is to ensure that EPA will have the power to deal directly with an ongoing environmental problem without awaiting issuance of a final permit.

2. PROCEDURAL BACKGROUND

This proceeding was initiated on September 27, 1996, when the Associate Director, Office of RCRA Programs, Hazardous Waste Management Division, United States Environmental Protection Agency, Region III (Petitioner) issued the Initial Administrative Order (IAO). The IAO could not become effective until Respondent Wheeling-Pittsburgh Steel Corporation (WPSC) had an opportunity to respond to it and to be heard by a neutral Agency Official in accordance with 40 C.F.R. Part 24. The IAO directed WPSC to undertake a RCRA Facility Investigation (RFI) and a Corrective Measures Study (CMS) at Respondent's Follansbee, West Virginia Coking Plant. The IAO also required Respondent to develop and implement certain Interim Measures (IM). Otherwise, the IAO did not

require Respondent to undertake corrective measures.

Respondent filed a timely request for hearing, and after a series of extensions, Respondent filed its Response on June 6, 1997. (The parties were engaged in active litigation in federal court over the IAO, and the parties jointly requested a series of extension orders in this proceeding, which the Presiding Officer granted. Petitioner also agreed to amend the IAO to restate its purpose, and did so on November 14, 1996. Respondent filed a second request for hearing, based on the issuance of the amended IAO, on December 12, 1996. Again, the parties requested a series of extension orders, which the Presiding Officer granted.) The litigation in the District Court concluded on April 24, 1997, with a decision and opinion in favor of EPA. WPSC appealed to the Circuit Court of Appeals for the Fourth Circuit, which affirmed the District Court with an opinion issued November 10, 1997.

Respondent filed its Response to the amended IAO on June 6, 1997, and filed the prehearing submission required by 40 C.F.R. § 24.10 on August 7, 1997. Petitioner issued a second amendment to the IAO on August 21, 1997, modifying the IM requirements of the Amended IAO. The parties agreed that another hearing request was not appropriate in light of the nature of the second amendment to the IAO, and the Presiding Officer concurred, hoping to move the matter more quickly toward hearing.

In its Response to the IAO and in its prehearing submission Respondent challenged the issuance and scope of the Amended IAO and many of its Findings of Fact, Conclusions of Law and provisions describing tasks to be performed. Respondent requested a hearing under 40 C.F.R. Part 24, Subpart C, entitled "Hearings on Orders Requiring Corrective Measures."[1] Apparently in response to the second amendment to the IAO, Respondent dropped its demand for a Subpart C hearing, and the case proceeded under 40 C.F.R. Part 24, Subpart B.

The hearing was held in this matter on September 17, 1997, in EPA's Regional Office in the 841 Chestnut Building, Philadelphia, Pennsylvania. The hearing commenced at 10:00 AM and was concluded at approximately 5:00 PM. All of the hearing participants, in particular Dr. Samples of WPSC, Dr. Ellingson of Geraghty & Miller, Mr. Hennessey and Ms. Quinn of EPA, were most helpful to the Presiding Officer in understanding the issues presented by the case. Because Respondent claimed that an unavailable person with very relevant information (Mark Wagner of WPSC's environmental consultant, Geraghty & Miller) should also be heard, the Presiding Officer decided to allow that person to submit additional

[1]Subpart C proceedings, for IAOs that require corrective action, are more complex and burdensome, particularly for the Petitioner, than the simpler Subpart B proceedings, which govern hearings or orders that require only investigations, studies or relatively inexpensive interim corrective measures.

undeveloped factual and technical matters before closing the record of the proceeding.

The Presiding Officer signed and issued a Summary of the hearing on September 23, 1997, as required by 40 C.F.R. § 24.12(a), and authorized the parties to make post-hearing submissions as contemplated by 40 C.F.R. § 24.11. All post-hearing submissions were submitted as directed by the Presiding Officer; the final submissions were filed on December 17, 1997. The Presiding Officer issued his Recommended Decision under 40 C.F.R. § 24.17(a), and served copies of the Recommended Decision on the parties to enable them to file comments on the Recommended Decision under 40 C.F.R. § 24.17(b). The Presiding Officer expressly directed the parties to file their comments with the Regional Hearing Clerk, as contemplated by 40 C.F.R. § 24.17(b). Counsel for Respondent did not have ready access to the administrative record, so the Presiding Officer provided him with a copy immediately. Both parties submitted comments. WPSC's comments were not signed by any of its representatives, although WPSC counsel did sign transmittal letters to the Regional Administrator and to the Regional Hearing Clerk. On the day WPSC's comment period expired, the company's Chairman, President and Chief Executive Officer (one man holding all three titles) wrote a letter to me that the Presiding Officer has characterized as a prohibited *ex parte* communication, combined

with a request to have the parties' staffs meet to attempt to resolve the matter in a mutually satisfactory manner. There can be no question that this transmittal was made in ignorance or in disregard of the separation of functions so clearly laid out in the applicable regulations, where the Presiding Officer and I perform quasi-judicial adjudicatory roles, separate and apart from the role of the Complainant as a party and her staff. The letter in question should have been transmitted to the Complainant.

Since the letter was directed to me, the Presiding Officer has taken several steps to address the situation. First, he has discussed the matter with counsel for both parties. Second, he has placed a copy of the letter in the record of this proceeding with his description of the circumstances under which the letter was transmitted to me. Third, the Presiding Officer has allowed the Complainant's representative an opportunity to review and respond to the letter on the record. Finally, the Presiding Officer has advised me of the range of sanctions I might impose for the violation of the *ex parte* communication prohibition. I have decided that, in light of the substantive content of the letter, no sanction is warranted.

3. WPSC's FOLLANSBEE COKING PLANT

WPSC owns and operates the Follansbee Coking Plant, located on

the East bank of the Ohio River[2] in the northern panhandle of West Virginia.[3] WPSC has two steel plants in the immediate vicinity of the Follansbee Coking Plant: the Steubenville Plant and the Mingo Junction Plant on the West bank of the Ohio.

Coke is an essential ingredient in steel production. The Follansbee Coking Plant occupies approximately 610 acres, mostly adjacent to the Ohio, but a Koppers Industries coal tar refining operation is situated between the River and a portion of the Facility.[4] (The Koppers Facility is already subject to a RCRA § 3008(h) order.[5]) The Follansbee Facility is capable of producing 4965 tons of coke per day, potentially employing about 550 people.[6]

Coke is produced by feeding large quantities of coal into huge ovens or batteries at high temperature in the absence of air. This process also produces a series of gases and liquids. The gases are cooled, and tar condenses. Tar and liquid from the cooled gases are collected in a decanter and refined to collect various saleable

---

[2]AR000342 (The "AR" references are to the IAO Administrative record; "TR" references are to the hearing transcript.)

[3]AR000197

[4]Petitioner's Exhibit 1 ("P-1") shows the relative locations of the Follansbee Facility, the Koppers Industries plant, nearby communities and the Ohio River.

[5]TR43;TR111;TR190;TR233

[6]AR000197; AR000343

products. The remaining tar ("coal tar") is transported by pipeline to the adjacent Koppers Industries facility for additional refinement.[7] At the Follansbee Plant, sludge from the decanting process(decanter tank tar sludge) is returned to the coking process.[8] This recycling of the decanter tank tar sludge is the AKJ process.

The primary coking operation at the Follansbee Facility is conducted in a series of coke batteries, numbered 1, 2, 3 and 8, laid out end to end, more or less parallel to the Ohio River. A WPSC Byproducts plant is located to the East of Battery Number 1. Two significant sampling wells, RW-1 and RW-2, are located near Batteries 1 and 2. Closer to the River, and in part adjacent to the Koppers Industries plant, lies the North Coal Pit, and to its South, the South Coal Pit. Under a berm between the North Coal Pit and the South Coal Pit there is a pipeline that carries coal tar from the WPSC Follansbee Facility to Koppers Industries for refining. South of the South Coal Pit is the Coke Storage South Coal Pit. Further South is the former decanter tank tar sludge impoundment area.[9] The Follansbee Facility has an on-site

---

[7]AR000343; TR97-98

[8]TR98-99.

[9]Amendment No. 1 to the IAO specifically excluded the decanter tank tar sludge impoundment from the reach of the IAO.

wastewater treatment plant, for the discharge of wastewater under National Pollutant Discharge Elimination System permits WV0004499 and WV0023281.[10] All of the foregoing physical features of the Follansbee Facility are clearly depicted on Exhibit P-1.

4. Relevant Regulatory Chronology

On August 18, 1980, Respondent submitted to EPA a complete "Notification of Hazardous Waste Activity" form for the Follansbee "Installation." (The term EPA used on the form).[11] On November 17, 1980, Respondent submitted an EPA General Information Form, with Part A of an application for a RCRA permit attached. The required drawing of the hazardous waste facility depicted only the decanter tank tar sludge surface impoundment.[12] Respondent used this impoundment to accumulate decanter tank tar sludge for off-site disposal before the effective date of the RCRA regulations.[13]

On August 8, 1981, EPA acknowledged Respondent's Interim Status under RCRA § 3005(e).[14] EPA listed the name and location of the Facility as, "Wheeling-Pittsburgh Steel Corporation, Route 2,

---

[10]AR000201, AR000342.

[11]AR00001-000003.

[12]AR000014.

[13]TR63

[14]AR000015-16

Follansbee, WV 26037."[15] On October 13, 1981, Respondent informed EPA of its plans to discontinue use of the decanter tank tar sludge surface impoundment and forwarded company plans for doing so.[16] Respondent later submitted additional U.S. EPA Notification of Hazardous Waste Activity forms on February 12, 1988,[17] on January 26, 1990,[18] and on January 21, 1991.[19]

This RCRA regulatory chronology stands in stark contrast to Respondent's counsel's initial remarks at the hearing:

> "First, and at the outset, let me state that Wheeling-Pittsburgh Steel at the Follansbee Plant has never engaged in the treatment, storage or disposal of hazardous waste.
>
> Wheeling-Pittsburgh Steel has never owned or operated a treatment, storage or disposal facility at that location."[20]

Counsel evidently either ignored or forgot that WPSC declared in RCRA Permit Application Part A that the Follansbee Facility

---

[15]AR000017

[16]AR000018-40

[17]AR000119-122

[18]AR000144-147

[19]AR000221-223

[20]TR62

"[d]oes or will..treat, store or dispose of hazardous wastes,[21] that on August 8, 1981, EPA acknowledged Respondent's Interim Status under RCRA § 3005(e), that the decanter tar tank sludge surface impoundment was adjudicated an interim status facility in an EPA administrative enforcement proceeding,[22] and that WPSC itself agreed that the decanter tank tar sludge surface impoundment was a RCRA interim status facility which WPSC "used to treat, store and/or dispose of the hazardous waste KO87."[23]

In its Post-hearing Reply Brief WPSC makes reference to a class of "protective filers," described by EPA as those facilities that submitted a Part A application, but never conducted a regulated activity requiring a permit.[24] WPSC alludes to a 1986 EPA statement that "protective filers" are not subject to EPA's corrective action authorities.[25] WPSC did not claim to be such a "protective filer" until it submitted comments on the Presiding Officer's Recommended Decision, and given the regulatory history

---

[21]AR000007

[22]See next section;AR000114-118

[23]Consent Decree § III D.;AR000125. KO87 is the Industry and EPA hazardous waste number for decanter tank tar sludge from coking operations. 40 C.F.R.§ 261.32.

[24]50 Fed. Reg. 38946, 38948 (September 25, 1985)(emphasis added)

[25]WPSC Post-hearing Brief, p. 5.

recited above, the relevance of WPSC's references to "protective filers" to the issue of RCRA § 3008(h) jurisdiction over the Follansbee Facility is tangential at best.

5. RELEVANT ENFORCEMENT HISTORY

A. Previous EPA/WPSC Litigation

In 1982, EPA filed an administrative enforcement action against Respondent under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), seeking to compel proper closure of the decanter tank tar sludge surface impoundment and the assessment of a $20,000 penalty. EPA alleged that the impoundment was an interim status facility.[26] After a full hearing, the Administrative Law Judge ruled in EPA's favor, assessing a $17,500 penalty and ordering Respondent either to prove the adequacy of its cleanup or to follow EPA closure rules.[27] EPA's Chief Judicial Officer affirmed on appeal.[28] WPSC filed suit in the Federal District Court to enjoin enforcement of the EPA order in 1985; EPA counterclaimed to have the order enforced. After four years of negotiations, the parties finalized a Consent Decree.[29] In settling the case, WPSC conceded that it had used the decanter tank tar sludge surface impoundment

[26] AR000042

[27] AR000048-69

[28] AR000114-118

[29] AR000123-143

to treat, store and/or dispose of hazardous waste KO87-decanter tank tar sludge from coking operations, and that the impoundment was an interim status facility,[30] but did not concede that the entire Follansbee Facility was an interim status facility.

The Consent Decree contains a dispute resolution clause[31] that Respondent invoked when Petitioner issued the IAO, as originally issued, the IAO applies to the whole Follansbee Plant. Thus, the matter was recently brought back to the Federal District Court on the jurisdictional issue of whether EPA may use RCRA § 3008(h) to require WPSC to perform the RFI, IM and CMS for the entire Follansbee Facility. As stated above, both the District Court and the Court of Appeals have ruled in EPA's favor.

B. Federal and State Inspections

The Administrative record contains a number of State and Federal Reports of Inspections at the Follansbee Facility that are relevant to the questions of whether a final administrative order should be issued, and if so, with what conditions.

On January 2, 1990, a West Virginia Department of Natural Resources (WVDNR) Inspector followed up on an earlier inspection during which WVDNR discovered decanter tank tar sludge being buried

---

[30]Consent Decree § IV; AR000125

[31]AR000136

on site instead of being returned to the coke oven.[32] The record also contains a reference to a report, supposedly prepared for WPSC, that some 40 tons of decanter tank tar sludge were buried on the Follansbee grounds, but not at the decanter tank tar sludge surface impoundment, sometime in 1987 or 1988.[33] WPSC does not deny the truth of this report.

On June 11, 1991, three WVDNR Inspectors found seven violations of the State's Hazardous Waste Management Act.[34] The inspectors discovered K087 on the soil near the decanter tar sludge boxes and coke oven gas drippings from the coke oven gas line.

6. Disputed Issues

Under 40 C.F.R. § 24.18, the Regional Administrator's Final Decision must be based on the administrative record, and, to the extent it modifies the Recommended Decision, it must indicate the legal and factual basis for the decision as modified.

I agree with the Presiding Officer that the key issues are:

A. EPA's jurisdiction to issue a corrective action order under Section 3008(h) for the Follansbee Facility;

B. Whether the administrative record supports a finding that a

---

[32]AR000151

[33]AR000214

[34]AR000224. This report was not written until November 19, 1991; a response addressing all of the cited violation is in the record at AR000237.

release or threatened release of hazardous waste into the environment has occurred or might occur at the Follansbee Facility;

C. Whether the administrative record supports a finding that response actions required by this IAO (RFI, IM and CMS) are necessary to protect human health and the environment.

7. ANALYSIS

A. EPA Jurisdiction: EPA uses the term "facility" in a "regulatory"[35] context in determining the discrete areas or units located on property utilized for hazardous waste management that need a RCRA permit or to obtain interim status:"...all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste." 40 C.F.R. § 260.10 [Definition of the term "facility," (1)]. Facilities implementing corrective action consist of "...all contiguous property under control of the owner or operator seeking a permit..." 40 C.F.R. § 260.10 [Definition of the term "facility,"(2)]. The entire "corrective action facility" is not necessarily used for the treatment, storage or disposal of hazardous wastes, but it may include areas, though not so used, which may be affected by the treatment, storage or especially disposal of hazardous wastes in a "regulatory facility" or any

[35]The term "regulatory" refers to the provisions of RCRA Subtitle C regulatory program, 42 U.S.C. § 6921 *et seq.*; the regulations are codified at 40 C.F.R. Parts 260-271.

other release of hazardous waste on the property. For that reason, where property owned or controlled by the owner or operator of a "regulatory" interim status facility located on that property has had or may have a release of a hazardous waste contaminate it, the property is a "corrective action facility," and comes under EPA's RCRA § 3008(h) jurisdiction. This is not new Agency policy, nor is it a novel application of existing law. The "corrective action facility" definition dates back at least to a Federal Register notice in July of 1985.[36] It was spelled out succinctly in EPA's December 15, 1985 Interpretation of Section 3008(h) of the Solid Waste Disposal Act. "For interim status corrective action purposes, EPA intends to employ the definition of 'facility' adopted by the Agency in the corrective action program for releases from permitted facilities...Therefore the definition of facility encompasses all contiguous property under the owner or operator's control." Interpretation of Section 3008(h), p. 7. In 1987 the Court of Appeals for the District of Columbia, dealing with the use of the word "facility" in RCRA wrote: "Clearly, 'facility' is used in section 3004(v) to describe all of the property under the control of the owner or the operator." United Technologies Corp. V U.S. Environmental Protection Agency, 821 F. 2d 714, 722. In 1989, the same court wrote: "If the expert agency believes that the

[36]50 Fed. Reg. 28702, 28712 (July 15, 1985).

legislative purpose will best be satisfied by construing the term to mean different things in different contexts, then it may act upon that premise. This court has previously upheld the agency's decision to employ different definitions of the term "facility" in construing different portions of the RCRA." The court cites the United Technologies Corp. case. Mobil Oil Corp. V EPA, 871 F. 2d 149, 153. A significant body of EPA administrative precedent also supports the definition of "corrective action facility."[37]

At the Follansbee Plant, the decanter tank tar sludge surface impoundment was conceded to be a "regulatory facility" in the Consent Decree (after being so adjudicated in an adversarial EPA administrative proceeding); there have been hazardous waste releases on the premises; it follows that the entire Plant is a "corrective action facility." This is not to say that the decanter tank tar sludge surface impoundment involved in the previous EPA administrative enforcement action and the Consent Decree has been the source of a release of a hazardous waste; here, the record shows other sources of hazardous waste releases, discussed above and below.

Even in the absence of the courts' legal opinions, on this record, like the Presiding Officer, I would still sustain the Petitioner's assertion of RCRA § 3008(h) authority over the entire

[37]See Petitioner's Post-hearing Brief, pp. 17, 19-22

Follansbee Facility. Most of the support for this view come from the actions of the Respondent. First, Respondent submitted a series of RCRA notifications not limited to the decanter tank tar sludge impoundment,[38] received written notice of interim status from EPA,[39] and never acted formally or informally to contest that notice, although it did subsequently submit closure plans for the decanter tank tar sludge surface impoundment. Counsel's dramatic declarations notwithstanding, the Follansbee Facility clearly qualified for interim status, and continued to submit RCRA Notification forms for several years as a generator of hazardous wastes. Further, courts that have considered the issue have concluded that once a facility has qualified for interim status, the facility remains within the reach of RCRA § 3008(h), even if interim status is lost.[40] Otherwise, a contaminated facility might not be subject to RCRA corrective action requirements if the owner

---

[38]AR000002, AR000007, AR000119, AR000144, AR000221

[39]AR000015

[40]U.S. v Indiana Woodtreating Corp., 686 F. Supp. 218, 223, n.3.(S.D. Ind., 1988) In USG Corp. V Brown,809 F. Supp. 573, (N. D. Ill., 1992), a decision in private litigation over indemnification obligations in a merger, EPA issued an administrative complaint under RCRA § 3008(a) seeking to compel proper closure of certain surface impoundments and a penalty of $69,500. The action was settled with Respondent agreeing to comply with applicable hazardous waste requirements and to pay a $45,000 penalty. Less than one month later, EPA initiated a RCRA § 3008(h) action against the Respondent, who lacked interim status.

or operator of such a facility chose to lose interim status intentionally, or never to seek interim status at all.

Second, the statement at hearing of William R. Samples, Respondent's Director of Environmental Controls,[41] described a lengthy history of an old coke making complex, that only recently has begun to correct drips and spills and leaks of "product" with the potential to contaminate the soil, the groundwater and the Ohio River (in diminishing concentrations). The exact age of the Facility is not in the record, but it is probable that decades of contamination have occurred at Follansbee. The observations of State and Federal officials during inspections of the Follansbee Facility bolster the impression of an historically contaminated operation.[42]

WPSC would have had the Presiding Officer adopt an extensive and informative analysis of the legislative history of RCRA in an effort to demonstrate that EPA has no RCRA § 3008(h) authority over the Follansbee Facility.[43] Petitioner submittted counter-arguments in post-hearing filings. After reviewing both WPSC's analysis and Complainant's counter arguments, the Presiding Officer expressly

---

[41]TR229-230

[42] AR000225,6,7;AR000245;AR000247;AR000527,8;AR001113;AR001454.

[43]WPSC Response to IAO, p. 6; TR143-151;WPSC Post-hearing Brief pp.6-16.

declined to adopt either party's analysis, since he saw no ambiguity in the wording of RCRA § 3008(h). I see no ambiguity in that statutory provision, either.

B. Release of a Hazardous Waste: RCRA does not define the term "release," so the Presiding Officer used EPA's definition, set forth in its Interpretation of Section 3008(h): "...a release is any spilling, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." (pp.4-5). The definition makes no reference to "units," contrary to WPSC's argument that RCRA § 3008(h) authority is limited to releases from units.[44]

1. **FORTY TONS OF KO87 BURIED ON SITE**: According to a report by Remcor, Inc., prepared for WPSC on the removal of buried sludge at the site, sometime between November 1987 and March 1988 approximately 40 tons of decanter tank tar sludge were buried at two locations at the site.[45] The undenied burial of forty tons of hazardous waste KO87 on the Follansbee grounds was clearly a release of a hazardous waste; WPSC's refusal to acknowledge this as a release of a hazardous waste demonstrates extreme bad faith in this proceeding.

2. **OTHER RELEASES**: In his January 9, 1990 report of an

---

[44]WPSC Post-hearing Brief, p. 6.

[45]AR000214

inspection he conducted one week earlier at the WPSC Follansbee Facility, West Virginia Waste Management Inspector James Fenske wrote:"...an investigation by the Waste Management Section revealed some KO87 was being buried on-site instead of being returned to the original process."[46] This "original process" appears to be WPSC's AKJ process, which was instituted in the late 1980's.[47] According to West Virginia Waste Management Section Inspector James Gaston's November 19, 1991 report of his June 11, 1991 inspection, there was "soil contaminated with KO87" at the Follansbee Facility.[48] There is no response from WPSC in the Administrative record to the January 9, 1990 report of KO87 being buried on-site. Although WPSC disputed the November 19, 1991 allegation that there was soil contaminated with KO87 at the Follansbee Facility in its Response to the IAO,[49] no evidence to counter that serious aspect of the inspector's report was introduced into the record by WPSC. WPSC's Director of Environmental Control, William Samples, did respond to the November 19, 1991 report that described soil contaminated with KO87, but Dr. Samples' comments were addressed to other portions of the

---

[46]AR000151

[47]TR000159

[48]TR000226

[49]WPSC Response of June 9, 1997, p.3.

inspection report.[50]

"KO87 spills have been noted around the accumulation boxes," wrote West Virginia Waste Management Inspector Pamela S. Beltz in her August 26, 1992 report of an inspection conducted on July 30 and August 20, 1992.[51]

Pamela S. Lyons inspected the Follansbee Facility on June 16, 1993, and in her July 15, 1993 report she described her observations of a box labelled "Hazardous Waste," which Facility representatives told her contained coal tar[52] removed from a roadway near the decanters. There is no response in the record to either of these latter two reports of potential KO87 spills at the Follansbee Facility.

The Presiding Officer inferred from WPSC's unresponsiveness to these reports of spills of KO87, which constituted additional releases of a hazardous waste, that these events did in fact occur.

---

[50]AR000237-239

[51]AR000247

[52]WPSC correctly points out that coal tar is not a KO87 hazardous waste in its June 9, 1997 Response to the IAO, at page 4. Decanter tank tar sludge from coking operations is the only hazardous waste listed with EPA Code KO87 at 40 C.F.R.§ 261.32. But WPSC used the term "coal tar" regularly to describe KO87 hazardous wastes on RCRA manifests. AR000161-167. Petitioner also confused coal tar with KO87 in Paragraph Z of the IAO, where a spill of coal tar from the pipeline to the Koppers operation is recited."Coal tar (KO87) is a listed hazardous waste." Dr. Samples dispelled this confusion for the Presiding Officer during the hearing. TR97-98.

If anything, WPSC confirmed a history of "drips and spills and leaks" through a statement of Dr. Samples at the hearing.[53]

WPSC's environmental consultant, Geraghty & Miller, conducted a number of studies at the Follansbee Facility, which by and large confirmed the presence of "coal tar product" and "dissolved coal tar and constituents" in groundwater under the Follansbee Facility.[54] Although the western portion of the Facility adjacent to the Koppers Facility may have been contaminated by releases that occurred at the Koppers Facility and by hazardous constituents migrating beneath the WPSC Facility,[55] contamination in the Byproducts area in the northern part of the Follansbee Facility was caused by releases of WPSC hazardous wastes in the forms of "drips and spills and leaks" and burial of K087 on the Follansbee grounds. The Administrative record clearly supports a finding that there have been releases of hazardous wastes at the Follansbee Facility and that there is a significant threat of further releases.

C. Response Actions (RFI, IM and CMS) are Necessary to Protect

---

[53]TR229-231.

[54]Wagner's "Undeveloped Testimony", p.3. The Presiding Officer assumed Mr. Wagner's reference to be to coal tar and not to decanter tank tar sludge (K087). See p.27, footnote 68, above.

[55]Groundwater monitoring at the southern part of WPSC's Facility is being conducted by Koppers under an EPA RCRA § 3008(h) order. TR43;TR111;TR122;TR190;TR191

Human Life or the Environment: Since this proceeding involves a RCRA Facility Investigation, Interim Measures (already being implemented by Respondent) and a Corrective Measures Study but no actual corrective actions, Petitioner must demonstrate by a preponderance of the evidence that a general threat, rather than an actual threat, to human health or to the environment exists at the WPSC Follansbee Facility.[56]

The parties focussed on protection of human health both in their document filings and in their statements at the hearing. Perhaps it was assumed by Petitioner and implicitly conceded by Respondent that operations at WPSC's Follansbee Facility over the years has harmed the environment; in any event, this record clearly supports a finding that past operations there have indeed harmed the environment. The 1992 samples from the North and South Interceptor wells indicated a floating phase hydrocarbon had been released in the Byproducts area of the Facility.[57] There was benzene at concentrations over the toxicity characteristic limit set forth at 40 C.F.R. 261.24. Respondent reported the generation of

---

[56]Interpretation of Section 3008(h) of the Solid Waste Disposal Act, an EPA guidance document dated December 15, 1985, and included in the record as Attachment 2 to Petitioner's October 15, 1997 Post-Hearing Brief. See also In the Matter of Sharon Steel Corporation, EPA Docket No. RCRA-III-062-CA, Decision of the (Acting) Regional Administrator (Feb. 9, 1994), included as Attachment 16 to Petitioner's Post-Hearing Brief.

[57]AR000408-413; AR000362

hazardous waste exhibiting the toxicity characteristic for benzene (D018) in a Notification of Hazardous Waste Activity in 1991.[58] Other hazardous constituents of decanter tank tar sludge, including toluene, benzo(a)pyrene and napthalene[59] were also detected in the groundwater at significant concentrations.[60]

Past practices involving the management of the decanter tank tar sludge (K087 when not being recycled) appear to have contaminated the soil and groundwater.[61] Boring logs and observations confirm migration of oily materials through the soil to the confining layer of rock, at least in one area.[62] Benzo(a)pyrene was detected in the bedrock layer aquifer.[63] Several other hazardous constituents were detected in the alluvial

---

[58]AR000222

[59]40 C.F.R. Part VII -Basis for listing hazardous waste K087 includes napthalene; 40 C.F.R Part 261, Appendix VIII-list of hazardous constituents; 40 C.F.R. Part 264, Appendix IX-Groundwater monitoring list.

[60]The Petitioner and the IAO compared measured concentrations of these hazardous constituents to Maximum Contaminant Levels (MCLs), concentrations set by Safe Drinking Water Act regulations (See 40 C.F.R. Part 141, Subpart B) and to Risk Based Concentrations, a set of non-regulatory levels. See IAO, Tables 1 and 2.

[61]TR106

[62]TR233, TR234

[63]AR001431;AR001453

aquifer.[64] Since the 1980's, WPSC's use of the AKJ system to recycle the KO87 back into the coking process has probably reduced the level of ongoing environmental harm, but the history of inspections recited above indicates that environmental harm continues. As counsel for WPSC observed:"...if the decanter tank tar sludge is discarded, and discard includes placing it on the ground, it continues to be a hazardous waste as it was before 1991 when the exclusion came out."[65]

There is inadequate information available to identify all of the sources of contamination[66] at WPSC's Follansbee Facility and that information must be developed before decisions can be made about whether corrective action should be commenced, and if so, what specific corrective actions should be taken. Action may have to be taken to protect the environment from those aspects of the coking operations and related KO87 management operations that constitute a threat of future additional harm to the environment.

The environmental harm poses the potential of harm to human health. Low levels of ammonia and phenol were detected in the Hooverson Heights water supply wells in 1986 and 1987, according to

---

[64]AR001431;AR001453

[65]TR153; The exclusion for recycled KO87 was published at 57 Fed. Reg. 27880 (June 22, 1992)

[66]TR105, TR106, TR248, TR249

Paragraph J of the IAO. WPSC's Response disputes this, but the company offered no proof to rebut the support for this finding contained in the administrative record.[67] WPSC did not dispute Paragraph T of the IAO, reciting elevated levels of benzene and toluene in the water supply of the City of Wheeling, West Virginia, one day after a spill occurred (and was reported) at the Follansbee Facility. Petitioner provided an expert's statement regarding "potential exposure" to contaminated soil.[68] This statement was also unrebutted.

At the hearing, WPSC relied exclusively on the "perimeter study" and an associated risk analysis conducted by their consultants in an effort to rebut the Petitioner's case for a threat to human health.

Having excluded consideration of the "perimeter study" and statements about it in response to Respondent's objections to its inclusion in the record, the Presiding Officer found that the Administrative record strongly supports a finding that a response action is necessary to protect human life or the environment. Again, since the sources and pathways of the contamination are not fully known, a RCRA Facility Investigation should be undertaken. WPSC indicated at the hearing that it is prepared to address a

---

[67]AR000215-216

[68]TR222

particular area of contamination even if it disagrees with EPA's assertion of authority.[69] The RFI may indicate the need for corrective action; it is also possible that no corrective action will be deemed necessary to protect human life or the environment.

8. SPECIFIC PROVISIONS OF THE INITIAL ADMINISTRATIVE ORDER

WPSC's Response to the IAO was not a "blanket" challenge to all of the findings, conclusions and directives of the IAO. Instead, WPSC carefully designated as contested provisions only those provisions that WPSC believed to be erroneous, unreasonable, illegal or any combination of the foregoing. This section will address those objections raised in the Response that have not been addressed above. Paragraph numbers and headings correspond to both the IAO and to WPSC's Response.

IV. FINDINGS OF FACT

C. This IAO finding recites the fact and content of WPSC's initial Notification of Hazardous Waste Activity. In the Response WPSC disputes that it identified itself as an owner/operator of a hazardous waste treatment, storage, and/or disposal facility for the 4 wastes listed in the Notification. The very first document in the Administrative record, an August 15, 1980 Notification of Hazardous Waste Activity signed by R.C. McLean, WPSC Vice

[69] TR171

President-Operations, clearly shows that Respondent identified itself as a generator of hazardous waste and an owner/operator of a hazardous waste treatment, storage, and/or disposal facility for the following hazardous wastes: FO16 (this waste was "delisted" on November 12, 1980[70]);KO87; D002(corrosive); and D003(reactive). Respondent offered no evidence to the contrary in support of its position disputing this finding.

K. This IAO finding states that a February 12, 1988 revised Notification of Hazardous Waste Activity Form indicated that specified wastes were "used" at the Follansbee Facility. WPSC's Response disputes this finding. The Notification of Hazardous Waste Activity form submitted on February 12, 1988 asks the notifier to list the hazardous wastes handled, not used, at the facility. Thus, the Notification states that WPSC handles KO87 and D001 at the Follansbee Facility. Respondent introduced no evidence to the contrary, so the finding, modified to substitute "handled" for "used", is valid.

Q. This IAO finding introduces "TABLE I," a listing of contaminants detected in samples taken from several locations on December 22, 1992. For comparison to the detected levels, Petitioner included

---

[70]45 Fed. Reg. 74888

columns labelled "MCL," "TLCP,[71]" and "RBC.[72]" WPSC disputed the statement that "MCLs reflect health factors and the technical and economic feasibility of recovering ccontaminants from the water supply." WPSC also disputed the MCL values listed in TABLE I.

The term "maximum contaminant level" means the maximum permissable level of a contaminant in water which is delivered to any user of a public water system. This term comes from the Safe Drinking Water Act's provisions on public water supplies.[73] The Presiding Officer was unable to find any support in the Administrative record for Petitioner's assertion that "MCLs reflect...the technical and economic feasibility of recovering contaminants from a water supply." At the hearing, the MCLs listed for Benz(a)anthracene, Chrysene, Benzo(b)fluoranthlene and Benzo(k)fluoranthlene in TABLE I were designated as proposed, and specific values were assigned to them.[74] The statement defining MCLs must be corrected; Table 1 should be modified to reflect the corrections noted at hearing.

---

[71]TCLP is a standard analytical procedure for assessing the contaminant concentration that would leach from a sediment. I concentration in the leachate exceeds TLCO limits, the sediment is classifiedas a hazardous waste.

[72]Risk-based concentration.

[73] Section 1401 of the Safe Drinking Water Act, 42 U.S.C. § 300f(3); 40 C.F.R. § 141.2

[74]TR39-41

S. This IAO finding contains a statement that wells R-210 and R-310 on the WPSC Facility are downgradient from the WPSC coal pits. WPSC disputes that statement. Exhibit R-1 shows the locations of wells R-210 and R-310 and the WPSC coal pits. The coal pits and the Koppers Industries facility lie between the wells and the Ohio River. It appears that the wells are upgradient of the coal pits and the Koppers facility. Petitioner's geologist, Joel Hennessy, stated: "Well R-210 and R-310...is (sic) over 400 feet from the boundary of the Koppers Industries facility...an incredibly substantial flow reversal for flow from the Koppers facility...to migrate all the way back to Well R-210 and R-310."[75] This statement supports Respondent's assertion that wells R210 and R-310 are upgradient from the coal pits.

There is also a TABLE II in this finding, listing contaminants detected in samples from Wells R-210 and R-310, and columns showing MCLs and Risk-Based Concentrations (RBCs) for each contaminant. WPSC disputes that any contaminant exceeds an MCL, disputes the relevance of the RBCs and disputes that any contaminant exceeded any RBC.

Sample analyses showed concentrations of benzene, benzo(a)pyrene and methylene chloride above the MCLs in well R-210.

[75]TR191-192

As far as Respondent's disputing the RBCs listed in TABLE II, the Presiding Officer found them to be relevant indicators of contamination, and he found that the RBCs for all seven contaminants were exceeded in the sampling in well R-210; RBCs for benzene, benzo(a)pyrene, and dibenz(a,h)anthracene were exceeded in the sampling in well R-310.

V. In this IAO finding, Petitioner alleges that WPSC's consultant told EPA representatives on May 14, 1996 that wells R-1 and R-2 were installed in 1995 "for the purpose of recovering hydrocarbons from the groundwater." WPSC's Response disputes the quoted portion of this finding. There is in the record a June 23, 1995 WPSC letter to WVDEP that refers to "recovery wells" and includes a recovery well schematic.[76] The Presiding Officer found no supporting evidence in the record for this finding as set forth in the IAO, so Petitioner has failed to meet its burden of proof with regard to it. WPSC also disputes the wording of this finding with regard to the location of well RW-2, but a fair reading of both the finding and WPSC's Response to it indicates to the Presiding Officer that the parties in fact agree that well RW-2 is not located at the site of former interceptor well RW-North, although well RW-1 was installed at or near the location of former

[76]AR001239-40

interceptor well RW-South.

W. This IAO finding describes the Geraghty & Miller "Perimeter Study" that the Presiding Officer has excluded from consideration at Respondent's request. It contains TABLE III, indicating levels of contaminants detected in samples during the study and it compares those levels to MCLs. WPSC disputes that the contaminants listed in TABLE III are constituents of concern, disputed the inclusion of one of the contaminants (beryllium) in the TABLE, and made assertions based upon the "Perimeter Study." This finding contains no allegation that the contaminants listed in TABLE III are constituents of concern. At WPSC's request, the Presiding Officer excluded consideration of the "Perimeter Study" from his deliberations.[77] WPSC offered no explanation for its disputing the inclusion of beryllium in Table III; beryllium is an inorganic contaminant with an MCL promulgated at 40 C.F.R. § 141.23.

Y. This IAO finding referred to the "Perimeter Study" as the source of information indicating that water from a certain well was being used as a dust suppressant, representing a possible route of exposure. In its Response, WPSC renewed its objection to use of the "Perimeter Study," denied that the well was actively used for

---

[77] See page 31, above.

dust suppression, and denied use of the well for dust suppression represents a possible route of exposure. Finally, WPSC stated that the well is not active or currently used. Having sustained WPSC's objection to the use of the "Perimeter Study," the Presiding Officer did not consider the basis for the finding. Since the finding is not otherwise supported in the record, the Presiding Officer recommends its omission from the order.

AA(2). This IAO finding states that the Ohio River is a high quality stream and a warm water fishery used for recreational purposes. WPSC disputes that the Ohio is a high quality stream in fact or by designation. Respondent offered no evidence in support of its disputing the finding that the Ohio River is a high quality stream and warm water fishery used for recreational purposes. In 1986, River uses included navigation, water supply, recreation, fishing, swimming, assimilation of wastewaters and power plant cooling.[78] Nothing in the record indicated any official "designation" of the River as a high quality stream, and Petitioner did not recite any such designation in the finding.

AA(3). This IAO finding states that a potential exists for food-chain contamination <u>if</u> hazardous wastes or hazardous constituents detected in soils and groundwater at the Follansbee Facility

---

[78]AR100501

migrate to the Ohio. WPSC disputes the potential for food-chain contamination and states that there is no migration of hazardous wastes or hazardous constituents from the company's property. WPSC's Response overreacts to this finding, apparently overlooking the "if" in the second line: "A potential exists for the contamination of the food chain if hazardous wastes...migrate...into the Ohio River." WPSC has not directly disputed this finding, and has introduced no evidence to contradict it, so the Presiding Officer recommended that it be retained in its original form.

AA(4). In this IAO finding, Petitioner describes a potential for contamination of the drinking water supplies from two communities downstream from the WPSC Facility, the city of Follansbee and the town of Hooverson Heights: Follansbee is one mile south of the Facility; Hooverson Heights is two miles southeast. Follansbee uses groundwater as its source of drinking water; Hooverson Heights uses groundwater and Ohio River water. WPSC disputes the possibility that contaminants from the WPSC Facility could contaminate the public water supplies, and also disputes the statement that there are four production wells for the Hooverson Heights water supply. Petitioner apparently changed its position on the source of Hooverson Heights drinking water between issuance of the IAO and the hearing, where it was conceded that the

Hooverson Heights source was the Ohio River.[79] The parties appear to agree that the city of Follansbee draws its water from wells subject to influence by the Ohio.[80] Petitioner's representative Elizabeth A. Quinn stated that surficial runoff could carry potentially contaminated soil into the river.[81] There is no record support for the proposition that contaminated groundwater might migrate from the Facility to the Follansbee and Hooverson Heights water supplies directly, but it is possible that groundwater flow into the Ohio might reach the cities' intakes.

AA(5). This IAO finding asserts that the well alluded to in paragraph **Y** creates potential dermal and inhalation routes of exposure, as water from the well was alleged to be used for dust suppression. WPSC disputes the potential for dermal and inhalation exposure. As stated in the discussion of paragraph **Y**, this finding is based upon information derived from the "Perimeter Study," and because that study and that information are not being considered by the Presiding Officer, this finding cannot be sustained.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

---

[79]TR20; TR59; TR213

[80]TR58; TR59; TR213

[81]TR210-211

C. This IAO Conclusion of Law states that the substances referred to in Paragraphs Q, S, T, W, X, and Z of the IAO are hazardous wastes or hazardous constituents. WPSC disputes this conclusion without indicating the basis of its dispute, so under 40 C.F.R. § 24.05(c), the Presiding Officer may consider this challenge not to be properly raised. With three exceptions, all of the substances referred to in Paragraphs Q,S,T and Z of Section IV are hazardous wastes or hazardous constituents. The exceptions are 4-Methylphenol, oil and coal tar, which the Presiding officer was unable to find in the various RCRA listings. Paragraphs W and X have not been considered because they are based on the "Perimeter Study."

VI. WORK TO BE PERFORMED

General Objections

WPSC complains that the stated **Work to be Performed** is unecessary, unduly burdensome and not supported by the record. This section of the order lays out work to be done by Respondent under the Order, making reference to a number of attachments addressing specific tasks and EPA guidance documents of a more general nature, and establishes part of the framework for the ongoing relationship of the parties under the Order. WPSC correctly states that extensive procedures and guidelines must be followed, and that voluminous guidelines are attached to the IAO. WPSC points out that

there are potential enforcement consequences and costly delays if the guidelines and procedures are not followed. Respondent disputes the breadth of the attachments and guidance and the discretion apparently retained by Petitioner to require additional measures, information and expenditures. Timeframes are too short, according to WPSC. The company's operations have been adversely affected by a labor strike, and the residualeffects of the strike might also interfere with performance of the Corrective Action Measures required by this order.

WPSC is correct in its characterization of the complex, costly and burdensome nature of the obligations this order places on the company. Soil and groundwater contamination by hazardous wastes and hazardous constituents is very costly to study. The first paragraph in the **Work to be Performed** section recites EPA's willingness to accept existing information rather than to require reassembling data. With the conclusion of the labor strike, some of WPSC's difficulties will be eliminated. Yet WPSC is the entity responsible for contamination of the soil and some of the groundwter under its property, so it is appropriate that EPA look to WPSC to undertake the responsibility of assessing the contamination in accordance with this order.

A. Interim Measures ("IM")

1. This Paragraph would have required WPSC to submit

to EPA an IM Workplan within thirty days of the effective date of the final order. WPSC objected to the 30-day time frame and the requirement to address contamination detected in recovery wells. WPSC's objections to this paragraph were addressed in the Second Amendment to the IAO, in which negotiated language was substituted for the original text. The operative language of the Amendment document should be substituted for the IAO language.

2. This Paragraph of the IAO would require WPSC to submit a Description of Current Conditions to EPA. EPA would then review the submission and other information to determine whether to direct WPSC to perform more Interim Measures. WPSC would have 10 days from receipt of EPA's directive(s) to submit an IM Workplan for EPA approval. WPSC objects on the grounds that the provision is "not supported by the record and insufficient for reasons it discussed hereinabove." (WPSC standard objection). This provision of the order is consistent with all other unilateral RCRA § 3008(h) orders issued in Region III, and will remain unchanged.

3. This Paragraph of the IAO would require WPSC to report releases of hazardous wastes or hazardous constituents not already addressed by the Corrective Action Order, and, within 10 days of receipt of a directive from EPA, to submit an IM Workplan to address those releases. WPSC's objection to reporting newly discovered releases, regardless of quantity, is off base. While the

Comprehensive Environmental Compensation and Liability Act, the Clean Air Act and the Clean Water Act impose their own respective reporting requirements applicable to the broad definition of "release,"[82] it is well within Petitioner's RCRA § 3008(h) authority to impose additional requirements, and, on the basis of any information indicating a release or a threat of a release of hazardous waste or hazardous constituent at the facility, to order corrective action, or other appropriate response measures. As indicated in the preceding paragraph, 10 days in most situations is too short a time to prepare an IM Workplan while trying to comply with a corrective action order and run a coking operation. In other situations, where time is of the essence, this requirement may take precedence over other work. Mutual reasonableness will be required of the parties to avoid wasted time, money and effort, and harm to human health or the environment. WPSC should be given 10 days to submit a IM Workplan in this provision.

B. RCRA Facility Investigation ("RFI")

7. This Paragraph requires submission of the Description of Current Conditions within 60 days of the effective date of the order. WPSC's objection is the "standard" objection. WPSC probably

---

[82] See p. 24, above.

has readily available most of the information required for the Description of Current Conditions; much of it was used in the "Perimeter Study" and during the course of this proceeding, or is contained either in the Administrative record supporting the IAO or in the materials added to the record since the IAO was issued. The 60-day timeframe for this part of the response is fair and reasonable, and it is consistent with all other unilateral RCRA § 3008(h) orders issued in Region III.

8. This paragraph would require WPSC to submit a Pre-Investigation Evaluation of Corrective Measures Technologies at the same time the Description of Current Conditions is due. WPSC disputes this requirement on its "General Objection" grounds. The requirement to submit a Pre-Investigation Evaluation of Corrective Measures Technologies at the same time the Description of Current Conditions is due means that WPSC and its consultant would have to work on them more or less simultaneously. The Presiding Officer drew an inference from this simultaneous requirement that EPA has prejudged the "Current Conditions" and has determined a need to commence investigating remedies. In this case, that makes no sense to the Presiding Officer. If EPA were in a special hurry to get this action underway, the simultaneous preparation and submission might be more reasonable, although in the view of the Presiding Officer, the quality of both products would likely suffer. Here,

Petitioner aquiesced in a delay of a year before bringing this matter to hearing. Granted, the judicial litigation might have made it awkward for EPA to address matters clearly in the court action, and there might have been limitations imposed on the administrative proceeding. In any event, the delay of a year in bringing the matter to hearing is not the only delay Petitioner could have avoided. After the hearing was "extended" to allow undeveloped matter into the record, Petitioner's key witness left the country for extended overseas travel. On his return, additional time was needed for him to review and respond to the Respondent's undeveloped matter (Mr. Wagner's submission). The Presiding Officer infers from this record that Petitioner is in no particular hurry to move this investigation forward.

It seems both logical and fair to have the Pre-Investigation Evaluation of Corrective Measures Technologies prepared after the Description of Current Conditions. Respondent and its consultant will have the benefit of being better able to dovetail the two work products, and Petitioner will not be prejudiced significantly more than it has consented to in the past.

On the other hand, the workload associated with the Pre-Investigation Evaluation of Corrective Measures Technologies is not so great as to require a 60-day timeframe. Since this report is based on "potential corrective measures known to Respondent"

(emphasis mine)[83] a 30-day period, beginning on Petitioner's notice to proceed (after review of the Description of Current Conditions) is appropriate. I realize that this is not consistent with other Region III RCRA § 3008(h) orders.

9. Under this paragraph, a third major submission must be made within 60 days of the effective date of the order: the RCRA Facility Investigation Workplan. The RFI Workplan requirements run over 20 pages in the IAO, compared with a single paragraph for the Pre-Investigation Evaluation of Corrective Measures Technologies, yet Petitioner would require both, as well as the Description of Current conditions, to be performed in the same 60-day timespan. I find this overly burdensome in this case.

Respondent will be allowed 90 days to complete the RFI Workplan, commencing 90 days after the effective date of the final order. I realize that this is not consistent with other Region III RCRA § 3008(h) orders.

10. This paragraph in the IAO lays out the general content of the RFI Workplan. WPSC disputes this requirement on the grounds that the equivalent of an RFI Workplan has already been submitted to EPA. The Presiding Officer was unable to locate any such submission in the record. To the extent work product

[83]IAO, Attachment B, p. 4

previously submitted to EPA is deemed by Petitioner to be the functional equivalent of any part of the RFI Workplan (or to fulfill any other requirement of the Order in whole or to a degree), such part need not be redone or resubmitted.[84] This concept was endorsed by Petitioner's representative at the hearing.[85]

WPSC also disputes EPA's authority to select a corrective measure(s) based upon the RFI Workplan. WPSC offers no argument or evidence in support of this proposition, so the Presiding Officer inferred there is none. EPA may order corrective action on the basis of its statutory authority, and the exercise of its discretion in selection of specific measures may not be arbitrary or capricious.

C. Corrective Measures Study ("CMS")

14. This paragraph requires submission of the Corrective Measures Study (CMS) within 60 days of receipt of EPA approval of the Final RFI Report. WPSC's objection to the requirement to submit a CMS within 60 days of EPA approval is based upon the notion that the CMS may not be necessary at all, yet the IAO makes it mandatory.[86] This issue was of concern to the Presiding Officer

---

[84] See first paragraph in Section VI. WORK TO BE PERFORMED

[85] TR215

[86] Prehearing Submission, p. 14

during the hearing as well.[87] EPA's representative, Mr. Hennessey, spoke of a "no action alternative" in a CMS.[88] But none of the EPA representatives suggested the possibility that the EPA approval of the preceding phase, the final RFI Report, might endorse a "no further action" determination. Thus, the IAO presupposes the need for, and imposes the absolute requirement for, a CMS, while Petitioner's representatives states "...we don't know the scope of what we might want to do..."[89]

The Presiding Officer found this sequence to be unreasonable, so the requirement to submit a draft CMS (an extension and refinement of work previously performed) should be made contingent upon an express determination by Petitioner in its approval of the Final FRI Report that a CMS either is necessary or is not necessary.

15. This paragraph requires WPSC to revise the draft CMS Report within 30 days of receipt of EPA comments and to submit a Final CMS Report. WPSC misreads this paragraph and objects to the requirement to submit a Final CMS report, revised to address all EPA comments, within thirty days of receipt of a Final RFI report. It is clear to the Presiding Officer that WPSC intended to

---

[87]TR244-250

[88]TR250

[89]TR248

object to the 30-day turnaround on EPA comments on the draft CMS report, not the Final RFI report. Given that EPA will have reviewed a Description of the Current Conditions, a Pre-Investigation Evaluation of Corrective Measures Technologies, an RFI Workplan and other materials, the 30-day requirement to finalize the CMS Report, incorporating EPA's comments based upon the draft, seems reasonable.

F. Submissions/EPA Approval/Additional Work.

20. The Second Amendment to the IAO obviated the need for WPSC to make IM Workplan submissions, except as required by conditions discovered during the tasks of the order under **VI. A. 3.** In those situations, 10 days is a reasonable amount of time to prepare an IM Workplan. WPSC's other submissions required by the order will be reviewed by EPA, and either approved in writing or disapproved for reasons set forth in writing. WPSC will have 30 days to revise all other deficient submissions.[90] WPSC raises only its "standard" objection to dispute this requirement. Since none of the revised submissions will be a "from scratch" effort, the 30-day time frame is reasonable.

23. This IAO paragraph imposes limitations on WPSC's hiring of professional engineers and geologists to oversee the work at the

---

[90]IAO, pp. 17-18.

Follansbee Facility. Essentially, EPA may veto WPSC's choices. WPSC's dispute with this is the "standard" one.

If WPSC has retained a professional engineer or geologist with expertise in hazardous waste site investigation, it is reasonable to require WPSC to identify that person and to document his/her qualifications for EPA. If no one has been retained, the 10-day limit might cause WPSC to hurry the selection of a key person in the company's compliance with the order; it is therefore unreasonable and possibly counterproductive. EPA should allow a 20-day period for WPSC to select a professional engineer or geologist. In the event EPA disapproves of WPSC's selection, EPA must provide WPSC a written statement of reasons, to avoid the appearance of arbitrariness. If EPA's reasons are confidential, the written statement should so indicate, and confidentiality may be maintained. The 15 days allowed for replacement of a "vetoed" engineer or geologist is adequate, given the universe of qualified environmental consultants. The requirement to notify EPA 10 days before voluntarily changing the engineer or geologist is reasonable.

24. This Paragraph sets up mechanisms for EPA to notify WPSC that additional work will be required, for consultation and Workplan submission. The procedures for notification, consultation, submittal and performance of additional necessary

work are reasonable and fair. WPSC's dispute with "the requirement that it has the opportunity to meet or confer with EPA to discuss the additional work" is illogical and counterproductive. The rest of WPSC's "standard" dispute requires no discussion.

IX. ON-SITE AND OFF-SITE ACCESS

A. This provision of the IAO asserts EPA's rights to go on the Follansbee Facility at reasonable times and to do all the normal inspection/investigation tasks performed under the regulatory statutes that EPA administers. WPSC uses its standard challenge to dispute this provision. The EPA rights of access set forth in the IAO do not significantly exceed the statutory rights of inspection conferred by RCRA § 3007, 42 U.S.C. § 6927. To the extent they do exceed the statutory rights, I find them to be reasonable, in the absence of any more specific objections and in light of the purpose of this action.

B. This provision uses the RCRA Off-Site authority to require WPSC to follow the contaminants beyond the Facility boundaries, if necessary, and even to compensate the landowner for the right to do so. EPA steps in when WPSC notifies it that 7 days of effort to obtain the off-site access have failed. Respondent lodges its standard objection to both parts of this provision. RCRA provides for the performance of corrective action beyond the boundary of a facility in RCRA § 3004(v), 42 U.S.C. § 6924(v). This provision of

the IAO implements that authority fairly and reasonably.

XII. PROJECT COORDINATORS

B. (Respondent's label; the objection goes to **A.** Of this section, not **B.**) This Paragraph (**XII.A**) contains EPA's designation of a Project Coordinator, and requires WPSC to name a Project Coordinator (who may not be legal counsel). The functions of the Project Coordinators are described in general terms. WPSC raises only its standard objection. Designation of a Project Coordinator is an important element in the success WPSC should desire to attain in compliance with this order. The requirement to notify EPA of the Project Coordinator selected by WPSC within 10 days of the order's effective date is fair, reasonable and prudent.

XV. RESERVATION OF RIGHTS

A-G. In this section of the IAO, EPA lays out reservations of various rights in five paragraphs (A, B,D,F and G), and makes two assertions about the legal effect of the order in two other paragraphs(C and E). In addition to its standard objection, WPSC objects to EPA's assertion that EPA may recover its costs. There is nothing unlawful or unreasonable in EPA's reservations of its various rights. To the extent EPA may attempt to enforce any of these rights against WPSC, the company is free to raise any defenses it may have. The assertion in Paragraph C is that WPSC's compliance with the order will not excuse violation of any other

law, and the assertion in Paragraph E is that the order is not a permit. These assertions are valid. As to recovery of EPA costs incurred under RCRA, the law in this Circuit is that such costs may be recoverable.[91] The entire **RESERVATION OF RIGHTS** section is valid.

9. RECOMMENDED REVISIONS TO THE IAO

On the basis of the administrative record, the Presiding officer's Recommended Decision and the comments submitted by the parties, I agree with the Presiding Officer that modification of the order is necessary and direct the signatory official on the IAO issued September 27, 1996, that the order be modified as follows:

A. In accordance with the November 14, 1996 negotiated amendment, add the following language to the current end of Section III of the IAO: "This Order does not require Respondent to perform Interim Measures, A RCRA Facility Investigation or a Corrective Measures Study for hazardous wastes and/or hazardous constituents which have been released or are being released into the environment from the surface impoundment referred to in Section IV, Paragraph H, below."

In accordance with the same amendment, revise Section IV., Paragraph H to read: "On October 2, 1989, EPA and WPS entered into

[91] United States v Rohm & Haas Delaware Valley, 2 F. 3d 1265 (August 12, 1993)

a Consent Decree to resolve outstanding issues relating to the administrative complaint filed by the EPA against WPS, WPS's subsequent administrative appeal of that complaint, and WPS's lawsuit to overturn EPA's Final Decision on the administrative appeal. In the Consent Decree, the Respondent agreed to, among other things, (1) conduct closure and post closure of the surface impoundment; (2) develop a groundwater monitoring plan to assess the scope of groundwater contamination from the surface impoundment and; (3) in the event the groundwater monitoring data indicates that hazardous wastes and/or hazardous constituents have been released or are being released into the environment from the surface impoundment at the Follansbee facility, implement EPA-approved or ordered corrective action, necessary to protect human health or the environment. Section VII of the Consent Decree provides that Respondent's agreement to perform this work in no way limits any other corrective action authority EPA may have. Furthermore, in Section XVII of the Consent Decree, EPA specifically reserved its corrective action authority under Section 3008(h) of RCRA, 42 U.S.C. § 6928(h)."

In accordance with the same amendment, the second paragraph of Section VI of the IAO should read: "Pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), Respondent is hereby ordered to perform the following tasks in the manner and by the dates specified

herein. This Order does not require Respondent to perform Interim Measures, a RCRA Facility Investigation or a Corrective Measures Study for hazardous wastes and/or hazardous constituents which have been released or which are being released into the environment from the surface impoundment referred to in Section IV, Paragraph H, above."

In accordance with the same amendment, the Sections entitled, "Purpose" in Attachments A, B and C should be deleted.

B. In accordance with the August 21, 1997 negotiated amendment, Section VI.A.1 of the IAO should be deleted and replaced with the following:

"Respondent shall operate and maintain an interceptor well system to recover coal tar released from the underground pipeline, as referenced in the Wheeling-Pittsburgh Steel Corporation report dated May 30, 1996. The purpose of said interceptor well system shall be to recover coal tar to contain, prevent further migration within the perched aquifer of, and prevent migration into the alluvial aquifer and the Ohio River of coal tar and any hazardous constituents associated with the coal tar. Within ten (10) days from the effective date of this Order, Respondent shall submit to EPA for approval a well monitoring and recovery plan for the coal tar spill area. Respondent shall at a minimum include the following in the well monitoring and recovery plan:

a. Procedures for daily monitoring of the existing six recovery wells known as KN, KS, PN, PS, RN, and RS. "Daily" as used in this Second Amendment to the Initial Administrative Order shall mean each working day. "Working day" shall mean a day other than Saturday, Sunday or Federal Hoilday.

B. Procedures for recovering coal tar using suction lift methods from the six recovery wells when monitoring indicates 1/8 inch or more of coal tar in any one of the six recovery wells; and

c. Methods and schedule for reporting to EPA the recovery well monitoring results and coal tar recovered.

Commencing within ten (10) calendar days of the effective date of this Order and continuing thereafter, Respondent shall install, operate and maintain a recovery system in the Byproducts area of the Facility to recover floating phase hydrocarbons which were identified in Interceptor Well North and Interceptor Well South. The purpose of said recovery system shall be to remove floating phase hydrocarbons to contain, prevent further migration within the perched aquifer of, and prevent migration into the alluvial aquifer and the Ohio River of floating phase hydrocarbons and any hazardous wastes and hazardous constituents associated with the hydrocarbons. Said recovery system shall include installation of appropriately

sized total fluids recovery pumps in, and piping at, recovery wells RW-1 and RW-2 at the Facility.

All materials pumped from the recovery system in the Byproducts area and the coal tar spill area shall be treated and/or disposed of in compliance with federal, state and local laws and regulations."

C. In accordance with the Recommendations of the Presiding Officer, Section IV., Paragraph K., should be modified by substituting the word "handled" for the word "used."

Also in accordance with the recommendations of the Presiding Officer, The following provisions of the IAO should be modified:

Section IV., Paragraph Q, should be modified as follows: From the first paragraph, delete,"...and the technical and economic feasibility of recovering contaminants from the water supply." In TABLE I, designate as "NA" the MCLs for Benz(a)anthracene; Chrysene; Benzo(b)fluoranthene; and Benzo(k)fluoranthene. Designate the RBCS for Benz(a)anthracene:0.000092 *mg/l*, Chrysene:0.0092 *mg/l*, Benzo(b)fluoranthene:0.000092 *mg/l* and Benzo(k)fluoranthene: 0.00092 *mg/l*.

Section IV., Paragraph S, change the next-to-last sentence to read: "These wells include two wells (R-210 and R-310) located on the WPS facility upgradient of the WPS coal pits."

Section IV., Paragraphs V, W, X and Y should be deleted in

their entirety.

Section IV., Paragraph Z should be modified by removing the last sentence: "Coal tar (K087) is a listed hazardous waste."

Section IV., Paragraph AA.4 should be modified as follows: In the first sentence, change the word "cities" to "city" and delete "and Hooverson Heights." Delete the next-to-last sentence: "Four(4) production wells near the Ohio River, approximately 1.8 miles from the Facility, supply drinking water to Hooverson Heights."

Section VI., Paragraph A.3, the last sentence should be modified by replacing "ten (10) calendar days" with "twenty (20) calendar days."

Section IV., Paragraph AA.5 should be deleted.

Section VI., Paragraph B.8. should be modified to read as follows: "Within thirty (30) days of receipt of EPA approval of the Description of Current Conditions and an express EPA directive to proceed, Respondent shall submit to EPA for approval a Pre-Investigation Evaluation of Corrective Measure Technologies ("Evaluation"). This Evaluation shall be developed in accordance with the RFI Scope of Work contained in Attachment B."

Section VI., Paragraph B.9., should be modified to read as follows: "Within ninety (90) days of receipt of EPA's approval of the Evaluation and an express EPA directive to proceed, Respondent

shall submit to EPA a Workplan for A RCRA Facility Investigation ("RFI Workplan"). The RFI Workplan is subject to approval by EPA and shall be developed in accordance with the RFI Scope of Work contained in Attachment B, RCRA, its implementing regulations, and such relevant EPA guidance documents as EPA may provide."

Section VI., Paragraph C. 14, should be modified to read as follows: "Within sixty(60) calendar days of receipt of EPA approval of the Final RFI Report, together with a written determination that a Corrective Measures Study ("CMS") is necessary, Respondent shall submit to EPA for approval a draft CMS Report in accordance with the CMS Scope of Work in Attachment C."

Section VI.F.23. should be modified to replace "ten (10)calendar days" with "twenty (20)calendar days" in the second sentence. Also, the fourth sentence should read:" EPA shall have the right, upon providing written reasons to Respondent, to disapprove at any time the use of any professional engineer, geologist, contractor or subcontractor selected by Respondent."

SO ORDERED.

Date:
APR 0 2 1998

W. MICHAEL MCCABE
Regional Administrator