UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

841 CHESTNUT BUILDING

PHILADELPHIA, PENNSYLVANIA 19107

IN THE MATTER OF: Sharon Steel Corporation Roemer Blvd. Farrell, Pennsylvania EPA I.D. No. PAD001933175, RESPONDENT	Docket No. RCRA-III-062-CA Proceeding Under Section 3008(h) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6928(h)

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 afacility authorized to operate under Section 3005(e) of RCRA, relatingto 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.

APPEARANCES

Petitioner's Representatives:

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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.

In recognition of the length and complexity of the RCRA permitting program, Congress authorized 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 applicablestatutory and regulatory requirements. RCRA 3005(e), 42 U.S.C. 6925(e).

Congress provided EPA with authority to require corrective action at permitted facilities in RCRA 3004(u), 42 U.S.C. 6924(u), and at interim status facilities in 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." H.R. Conf. Rep. No.1133, 98th Cong., 2d Sess. 111 (1984).
>
> All orders issued under RCRA 3008 are subject to the public hearing provision of RCRA 3008(b), 42 U.S.C. 6928(b):
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> Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing...

The procedural aspects of order issuance and the conduct of public hearing associated with interim status corrective action orders are governed by EPA regula tions codified in Title 40 of the Code of Federal Regulations, Part 24, entitled, RULES GOVERNING ISSUANCE OF AND ADMINISTRATIVE HEARINGS ON INTERIM STATUS CORRECTIVE ACTION ORDERS. These are the regulations that govern this proceeding.

PROCEDURAL BACKGROUND

This proceeding was initiated on September 23, 1992, when the Associate Director, Office of RCRA Programs, EPA-Region III (Petitioner) issued the Initial Administrative order.[1] The Initial Administrative order directed Sharon Steel Corporation (Respondent) to undertake a RCRA Facility Investigation (RFI) and a Corrective Measures Study (CMS) at Respondent's Farrell, Pennsylvania Facility. The Initial Administrative Order also would require Respondent to develop and implement an Interim Measures (IM) Workplan if Petitioner determines that corrective action is necessary to protect human health or the environment. Otherwise, the Initial Administrative Order did not require Respondent to undertake corrective measures.

Respondent's Response to Initial Administrative Order and Request for Hearing (Response), dated October 26, 1992, was timely filed with the Regional Hearing Clerk According to the Response, the Initial Administrative Order was served upon Respondent on September 28, 1992. Respondent challenged the issuance and scope of the Initial Administrative Order and many of its Findings of Fact, Conclusions of Law and other provisions. Respondent requested a hearing under 40 C.F.R. Part 24, Subpart B, entitled "Hearings on Orders Requiring

Investigations or Studies." [2]

By letter dated November 2, 1992, the Presiding Officer scheduled the hearing for November 23, 1992. By letter dated November 11, 1992, the Presiding Officer postponed the hearing for 60 days at the request of Respondent.[3]

Respondent submitted information and argument supporting Respondent's position on January 15, 1993. [4] Petitioner moved to exclude Respondent's prehearing submission from the administrative record on January 20, 1993. Petitioner asserted that the deadline for Respondent's submittal under 40 C.F.R. 24.10(a) was January 14, 1993, that Respondent's submission was filed one day late, that Petitioner's counsel did not receive the submission until the end of the business day on January 19, and that Petitioner would be unduly prejudiced if the Respondent's prehearing submission were allowed into the record.

The hearing was held in this matter on January 22, 1993, in EPA's Regional office in the 841 Chestnut Building, Philadelphia, Pennsylvania. The hearing commenced at 10:00 AM and was concluded at approximately 5:20 PM. After opening the hearing and asking about past settlement negotiations, [5] the Presiding Officer noted Respondent's opposition to Petitioner's motion to exclude, and heard counsels arguments. The Presiding Officer denied the motion, finding that prejudice to the Petitioner would be minimized, and the efficient administration of justice would be served, by allowing the hearing to proceed as scheduled and by affording both parties a full opportunity to submit additional information (including but not limited to posthearing briefs on undeveloped factual, technical or legal matters) before closing the record of the proceeding.[6]

The Presiding Officer signed and issued a Summary of the hearing on March 3, 1993, 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. Petitioner filed its post-hearing submission on April 8, 1993, and Respondent filed its post-hearing submission on May 24, 1993. Petitioner moved for leave to respond to Respondent's post-hearing submission, and the Presiding Officer granted that motion. Petitioner's response was filed on June 23, 1993. Respondent sought and obtained leave to reply to Petitioner's response, and filed its reply on July 12, 1993. The Presiding Officer prepared and filed with me a Recommended Decision on August 5, 1993. Petitioner filed comments on the Recommended Decision on August 26, 1993, and the Respondent filed comments on the Recommended Decision on August 30, 1993. I have considered the Recommended Decision and the comments of both parties in reaching this Final Decision.

<u>The Farrell Works</u>

Respondent owns and operates an integrated steelmaking plant located in Mercer County, Pennsylvania, known as the "Farrell Works."[7] The Farrell Works covers between 900 and 1000 acres.[8] Located about 3/4 of a mile east of the Pennylvania/Ohio border and about 1 mile north of Interstate 80, the Farrell Works produces hot-rolled, cold-rolled, forging quality, carbon and alloy steel products. Blast furnaces, an open hearth furnace and basic oxygen furnaces are operated at the Farrell Works. Acid pickle liquors are used in the steel finishing processes.

The Shenango River flows generally from the north to the south and then to the east through the Farrell Works, separating the operating plant, where steel is made and finished for shipment on the east side of the River, from Respondent's property on the west side of the Shenango. [10] A trestle or bridge owned by Respondent [11] crosses the Shenango, providing rail access from the steelmaking operation on the east side of the river to Respondent's property on the west side of the river.

The Respondent's property on the west side of the river is "undeveloped"[12] but has been used for many years as a disposal area for slag, a byproduct of the steelmaking operations, transported across the trestle from east to west. For over 30 years (1949-1981) Respondent also transported spent acid pickle liquor from the steel finishing operations across this trestle to the west side of the river, where it was poured over hot blast furnace slag.[13] At approximately 2000 degrees (F) this slag vaporized some of the spent acid pickle liquor, which formed acid gases that stripped paint from the rail tank cars.[14] Some of the spent acid pickle liquor remained in a liquid state, trickled through lower layers of slag and migrated downgradient into the groundwater.[15] Between 1949 and 1981, an estimated 21 million gallons of spent acid pickle liquor per year were handled in this manner.[16] Since December of 1981 Respondent's spent acid pickle liquor has been regenerated for reuse at an on-site facility operated by Pennsylvania Engineering Corporation.[17]

Between 8 and 10 acres comprise the Acid/Slag Disposal Area, which is about 1/2 mile south-southwest of the steelmaking operation and on the opposite side of the Shenango.[18] A portion of the Acid/Slag Disposal Area area is depicted in three snapshots taken in 1984 or 1985, Hearing Exhibits H-1, H-2 and H-3. This area is part of a 25-30 acre slag disposal area that has for over 50 years has been used as a source for Dunbar Slag company, a commercial slag processing facility adjacent to the disposal area.[19]

In September and October of 1992, Respondent shut down all of its steelmaking furnaces and idled most of the steel finishing operations at the Farrell Works.[20] All operations at the Farrell Works ceased in November of 1992 and Respondent filed bankruptcy papers in the

United States Bankruptcy Court for the Western District of Pennsylvania on November 30, 1992.[21]

Relevant Regulatory Chronology

Respondent submitted a Notification of Hazardous Waste Activity form dated August 14, 1980. EPA received the form on August 18, 1980[22]. EPA acknowledged receipt of the form by return form dated October 9, 1980. [23] Respondent submitted a Hazardous Waste Permit Application (parts 1 and 3) dated November 18, 1980, which EPA received on November 19, 1980[24] and acknowledged by notice dated December 23, 1980.[25]

Respondent reported an April 4, 1984 waste pickle liquor spill of 250 gallons to the Pennsylvania Department of Environmental Resources (PADER) by form and letter dated April 27, 1984. Respondent reported an April 26, 1984 waste pickle liquor spill of 250 gallons, a May 4, 1984 waste pickle liquor spill of 2000 gallons, and a May 4, 1984 waste pickle liquor spill of 500 gallons to PADER by forms and letter dated May 11, 1984. Respondent reported a May 22, 1984 waste pickle liquor spill of 1000 gallons and a June 7, 1984 waste pickle liquor spill of 600/700 gallons to PADER by forms and letter dated June 8, 1984.[26]

On June 28, 1984, EPA issued an administrative complaint under RCRA 3008(a), 42 U.S.C. 6928(a), seeking to compel Respondent to comply with certain groundwater monitoring requirements and proposing to assess a penalty of $35,250.00 for the cited violations.[27]

Respondent reported a July 14, 1984 waste pickle liquor spill of 100-200 gallons to PADER by form and letter dated July 20, 1984.[28] Also on July 20, 1984, Respondent filed an answer to the EPA's June 28, 1984 administrative complaint and requested a hearing on the allegations and proposed penalty.[29]

Respondent reported an October 3, 1984 waste pickle liquor spill of 100-200 gallons to PADER by form and letter dated October 15, 1984.[30]

On December 10-11, December 27, 1984, January 24 and January 29, 1985, PADER conducted a Site Inspection at the Acid/Slag Disposal Area, and forwarded to EPA an undated report entitled, SITE INSPECTION OF THE ACID SLAG DUMP AT SHARON STEEL CORPORATION, presumably sometime in 1985.[31] NUS Corporation, an EPA contractor, prepared a listing site inspection interim work plan for the Sharon Steel Slag Dump Site, dated August 18, 1989.[32]

On September 19, 1989, a Consent Agreement resolving the action initiated by EPA's June 28, 1984 administrative complaint, was

issued.[33]

Respondent submitted a Notification of Hazardous Waste Activity regarding used oil fuel activities dated January 27, 1986, which EPA received on January 31, 1986.[34] Respondent submitted a Notification of Regulated Waste Activity dated 35 December 7, 1990 regarding an anticipated change in ownership.[35]

Disputed Issues

Under 40 C.F.R. 24.12(b), the Presiding Officer's Recommended Decision must address all material issues of fact or law properly raised by Respondent, and must recommend that the order be modified, withdrawn or issued without modification. The Recommended Decision must contain an explanation with citation to material contained in the record for any decision to modify a term of the order, to issue the order without change, or to withdraw the order. If the Presiding Officer finds that any contested relief provision in the order is not supported by a preponderance of the evidence in the record, the Presiding Officer shall recommend that the order be modified and issued on terms that are supported by the record or withdrawn.

The Presiding Officer's Recommended Decision meets the requirements of 40 C.F.R. 24.12(b), and I am incorporating much of the text of the Recommended Decision into this Final Decision.

Respondent "properly raised" these issues in its Response by specifying each disputed factual or legal determination, or relief provision in the Initial Administrative Order, with a brief indication of the bases upon which it disputed them. 40 C.F.R. 24.05(c).

A. The "facility." Section 3008(h) of RCRA, 42 U.S.C. 6928(h), is entitled "Interim status corrective action." By its own terms, this provision appears to limit Petitioner's jurisdiction to "a facility authorized to operate under section 6925(e) of this title." That section of RCRA contemplates "interim status," legally equivalent to "permitted" status, for hazardous waste treatment, storage and disposal facilities meeting procedural and substantive operating requirements while formal permit applications are being processed.

Petitioner takes the position that the entire Farrell Works, both the steelmaking and finishing operations on the east side of the Shenango and the "undeveloped" disposal areas on the west side of the river, comprise the "facility."[36] Respondent takes the position that only the Acid/Slag Disposal Area was authorized as an interim status facility under section 3005(e) of RCRA, 42 U.S.C. 6925(e), that the east and west sides of the Shenango River are not contiguous, and that the steelmaking and finishing operations on the east side of the Shenango are not part of the "facility." Respondent's ownership and operation of the entire Farrell Works is not in dispute.

RCRA does not include a definition of "facility." EPA has a general RCRA regulatory definition: " ... 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 (Emphasis added). EPA also has a RCRA Corrective Action regulatory definition: "all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA." 58 Fed. Reg. 8,658 (February 18, 1993), to be codified at 40 C.F.R. 260.10 (Emphasis added).[37] Before this latter, broader definition became a rule, it was sustained by a court in United Technologies Corp, v. EPA, 821 F 2d. 714, 721-23 (D.C. Cir. 1987).

The parties have engaged in some post-hearing debate regarding the applicability of these rules to this case. This proceeding is not an "appeal" of an agency action, as Respondent suggests (Reply, p. 5). Since final agency action in this case will not occur until the Final Decision has been filed and served (40 C.F.R. 24.20) and since this decision must be based upon the administrative record (40 C.F.R. 24.18), these rules, their respective administrative histories, and all other material properly filed in this action were evaluated by the Presiding Officer in developing his Recommended Decision. 40 C.F.R. 24.12(b).

Under these regulatory definitions, contiguity of property (including land, structures, other appurtenances and improvements on the land) and use (past, present or future) for the treatment, storage or disposal of hazardous waste are essential jurisdictional elements for the exercise of RCRA corrective action authority.

(1) Contiguity. The Shenango River, [38] the stream bed of which is owned by the Commonwealth of Pennsylvania, separates the steelmaking and finishing operations on the east side of the river from the "undeveloped" property, including the Acid/Slag Disposal Area, on the west side of the river. Respondent's property deeds, Hearing Exhibits H-4 and H-5, describe parcels of land bounded by the low water mark of the Shenango River. The east and west sides of the Shenango River are not contiguous.[39]

EPA's position on contiguity in the context of the corrective action definition of facility was stated in the rulemaking process (Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, proposed 40 C.F.R. 264.51):

> Clearly, property that is owned by the owner/operator that is located apart from the facility (i.e. is separated by land owned by others) is not part of the facility. EPA does intend, however, to consider property that is separated only by a public right-of-way (such as a roadway or a power transmission right of way) to be contiguous property... "

55 Fed. Reg. 30,808 (July 27, 1990)(emphasis added).

In an administrative decision that predated this statement, In the Matter of Navajo Refining Co., RCRA Appeal No. 88-3 (Order Denying Review, June 26, 1989), EPA's Administrator sustained EPA Region VI's assertion of corrective action authority over a three mile long ditch (property) controlled, but not owned, by the permittee. The Administrator clearly distinguished the criterion of control (and use) of the ditch from the criterion of contiguity and found that the ditch was both contiguous to the permittee's RCRA facilities (a refinery that generated hazardous wastes and remote treatment ponds), and under the permittee's control (permittee had used the ditch for over 50 years to convey wastewater from the refinery to its evaporation ponds). According to the Administrator's analysis in Navajo, "[t]he issue reduces to whether Navajo exercises sufficient control over the ditch..." ownership of the ditch was not considered as determinative.

The ditch in the Navajo case was a "structure, appurtenance or improvement" on the land of another. The ditch was contiguous to two parcels of land owned by the permittee, separated by three miles of land of another. Although the permittee did not own the ditch, the Navajo permittee exercised a level of control over the ditch sufficient for the Administrator to consider it to be part of the permittee's facility for purposes of RCRA corrective action.

In this case, the trestle is a structure, appurtenance or improvement spanning the land of another. Respondent owns the trestle. The trestle is contiguous to two parcels of land owned by the Respondent, separated by some two hundred feet of land owned by another. The Respondent exercises at least as much control over the trestle as the Navajo permittee exercised over the ditch in that case. I therefore find that the trestle provides the contiguity necessary under the Navajo analysis to include the steelmaking and finishing area of the Farrell Works in the RCRA corrective action facility. Respondent's property on both sides of the Shenango, and its trestle spanning the river, comprise the facility.

2. Use for the treatment, storage or disposal of hazardous waste. The waste acid pickle liquor was all generated on the east side of the river, and there have been spills of waste acid pickle liquor in the steelmaking and finishing areas of the Farrell Works. The history of spills supports the finding that RCRA interim status corrective action authority applies to that side of the river.

RCRA's permit program and interim status corrective action program apply to all facilities that treat, store or dispose of hazardous wastes, but they do not extend to facilities that only generate hazardous wastes. 42 U.S.C. 6924, 6925, 6928. Generators of hazardous wastes are subject to RCRA standards under 42 U.S.C. 6922.

Respondent's RCRA Notification of Hazardous Waste Activity, signed August 14, 1980, identifies the Farrell Works as an installation active in both the generation and the treatment/storage/disposal of hazardous waste.[40] Respondent's RCRA Part A Permit Application, signed November 18, 1980, includes a facility drawing depicting a hazardous waste "treatment area" located on the west side of the Shenango River. The east bank of the Shenango appears on the drawing, but no facility is shown on the east side of the river, nor is the trestle shown.[41] EPA acknowledged receipt of the Notification and of the Part A Hazardous Waste Permit Application on December 23, 1980.[42] Thus, the RCRA permit related evidence in the record supports Respondent's position that the Acid/Slag Disposal Area was the facility authorized to operate under the interim status provisions of RCRA Section 3005(e), 42 U.S.C. 6925(e).

Since spills constitute a form of disposal under the statutory definition of the term, 42 U.S.C. 6903(3), the spills of waste pickle liquor in the steelmaking and finishing area of the Farrell Works during 1984, summarized in Hearing Exhibit H-7,[43] suggest that Respondent's property on the east side of the river could be considered a facility used for the disposal of hazardous waste. EPA's position on this kind of spill was also clearly stated in rulemaking:

> EPA does not believe that section 3004(u) (Continuing releases at RCRA-permitted facilities] applies to spills that cannot be linked to solid waste management units. For example, a spill from a truck traveling through a facility would not constitute a release from a solid waste management unit. It should be recognized, however, that such a spill, if it occurs after November 19, 1980, is nonetheless actionable because it constitutes illegal disposal (i.e. disposal that does not occur in an authorized unit).

50 Fed. Reg. 28,712-13 (July 15, 1985).

In another RCRA permit appeal EPA's Administrator later cited this language in support of his conclusion that the term "solid waste management unit" includes areas contaminated by routine and systematic releases, but not by a one-time, accidental spill. In The Matter of Amerada Hess Corporation, RCRA Appeal No. 88-10, at 3 n.4, (Order Denying Review, August 15, 1989).

The eight spills described in Respondent's reports to the Pennsylvania Department of Environmental Resources,[44] six of which are summarized in Hearing Exhibit H-7, occurred within a six month period, and while they were not necessarily "routine and systematic releases," they were more than a "one-time, accidental spill." It is not necessary to characterize the spill areas as "solid waste management units" however, because corrective action under Section 3008(h) of RCRA is not limited to releases from hazardous waste management units. Interpretation of Section 3008(h) of the Solid Waste Disposal Act, cited

in footnote 37, above, at p. 8; In The Matter of Chevron USA Inc., RCRA Appeal No. 89-26, at 3, n.3, (Order on Petition for Interlocutory Review, December 31, 1990); In The Matter of Solvay Animal Health, Inc., EPA Docket No. VII-90-H-0001 (Recommended Decision, February 26, 1991). All parts of an interim status facility, even parts not containing wastes, are subject to corrective action. In The Matter of Liquid Chemical Corporation, EPA Docket No, RCRA-09-88-004 (Recommended Decision, July 7, 1989).

Based upon EPA's regulatory definitions of the term "facility," and consistent with Agency policy, judicial and Agency administrative law precedent and the Presiding Officer's Recommended Decision, I find that all of Respondent's Farrell Works, including the steelmaking and finishing plant and the rest of Respondent's property on the east side of the Shenango River are part of the "facility."

B. Release of hazardous waste into the environment. Respondent's Response did not specifically challenge Conclusion of Law V. D. in the Initial Administrative order, which recited the release of hazardous waste into the environment. Respondent did dispute Petitioner's Findings of Fact IV. C., D., H. and I. and Conclusion of Law V.C. regarding various substances alleged to constitute hazardous waste. If any hazardous waste was released into the environment from the facility, this stautory element is satisfied.

Spent pickle liquor has an EPA-assigned hazardous waste code of K062. 40 C.F.R. 261.32. Respondent has conceded that spent pickle liquor was released into the environment when it seeped through the slag pile prior to 1981[45] . The parties disagree on whether other materials (iron, oily sludge) are hazardous wastes or hazardous waste constituents. Since the record shows that there has been a release of a hazardous waste to the environment, these subsidiary issues are immaterial to the dispute and it is unnecessary to address them.

C. Response action deemed necessary to protect human health or the environment. The Initial Administrative Order would require Respondent to undertake an RFI and a CMS. No corrective action of a remedial nature is required. Petitioner's representatives confirmed at the hearing that separate orders would be issued, and hearing rights afforded, in connection with any further corrective action requirements. This approach was recently endorsed by EPA's Environmental Appeals Board in a RCRA permit appeal.[46] While the issues and procedures involved in that case were substantially different, the principle that hearing rights (in RCRA permit appeals hearings are held under 40 C.F.R. Part 124) attach to newly-imposed RCRA corrective action requirements applies in this setting too.

Thus the issue is whether the RFI and CMS are necessary to protect human health and the environment. The RFI is the means by which the Respondent can document the nature and extent of all hazardous

waste releases at the facility and the CMS is the means by which Respondent can identify and evaluate alternatives for corrective action. Petitioner's position is that both the RFI and the CMS are necessary to protect human health and the environment and Respondent's position is that neither is necessary.

It is EPA's position that "[t]o compel corrective action investigations or studies, only a general threat to human health or the environment needs to be identified." Interpretation of Section 3008(h) of the Solid Waste Disposal Act, cited in footnote 37, above, at p. 15. Petitioner has gone well beyond identifying a "general threat to human health and the environment" in the Initial Administrative Order, and the record amply supports the need for corrective action studies. Given the estimated volume of hazardous waste involved (21 million gallons a year for over 30 years), the manner in which these wastes were handled, the environmental monitoring data put into the record by the parties (including data presented by Respondent showing improvement in the water quality of the Shenango River), and the remedial nature of the statutory provision involved in this case, the Regional Administrator finds that the administrative record shows a potential for harm to human health and some actual, albeit unquantified, harm to the environment. More exact quantification of the harm and possible remedies for the harm are the objectives of the RFI and the CMS. Respondent must be required to perform both the RFI and the CMS.

SPECIFIC TERMS DISPUTED

A. Parties Bound. Paragraph 1. of Section II of the Initial Administrative Order purports to bind Respondent's successors and assigns to the terms of the Order. In its Response, Respondent disputed this provision on the grounds that it was arbitrary, capricious and an abuse of discretion because it did not authorize the transfer of Respondent's duties and obligations under the Order to a transferee willing to assume them with EPA approval. Given Respondent's bankruptcy, a transfer of the facility is a real possibility.

Petitioner did not specifically address Respondent's assertion in filings on the record until after the Recommended Decision, and neither party has addressed the question of whether the requirements of a RCRA 3008(h) interim status corrective action order "run with the land."

Under Section 3008(b) of RCRA, 42 U.S.C. 6928(b), there is a right to a public hearing that any person named in an order may invoke, as Respondent has done. To the extent this language might deny such right, it is not valid. Respondent's successors and assigns might waive that right, but without such a waiver, the Order would not bind Respondent's successors and assigns. It is possible that with such a waiver, Petitioner might either amend the Order or issue a separate order to a transferee, and thus bind Respondent's successor or assign, but due process considerations preclude this Order's binding of others without an opportunity for public hearing. At hearing, Petitioner's

representatives did concede that only parties to the order would be bound by its terms, and that EPA might later consider "releasing" Respondent and binding a successor.[47] The Presiding Officer recommended simply deleting the reference to "successors and assigns." In its comments on the Recommended Decision, Petitioner has suggested alternative language that addresses the concerns described above. I am adopting Petitioner's suggested language in this Final Decision. I direct modification of this provision of the Initial Administrative Order by changing the reference from "successors and assigns" to "any person or entity who, under applicable laws of corporate successorship, or any other law, succeeds to the liability of Respondent under this Final Order."

B. Findings of Fact. Section IV. of the Initial Administrative Order recited Findings of Fact. The lettered paragraphs listed below were disputed by Respondent:

Paragraph A. defines the facility properly, as discussed above. The steelmaking and finishing areas of the Farrell Works on the east side of the Shenango River are part of the facility subject to this RCRA Interim Status corrective action order.

Paragraphs C. D. and E. refer to "the Facility," meaning the entire Farrell Works. As stated above, the portions of the Farrell Works on the east side of the Shenago River are part of the facility. The record supports the statements as they apply to the Farrell Works as a whole. Respondent characterized Findings C. and D. as relating to "the alleged impact of treated industrial wastewater discharges on the Shenango River, which discharges are specifically excluded from the definition of solid wastes under RCRA because they are regulated under 402 of the Clean Water Act."[48] As Petitioner correctly pointed out, it is EPA's position that "where permitted releases...have created threats to human health or the environment ... EPA will take necessary action... under section 3008(h) (for interim status facilities)."[49] I find no basis for modification of these provisions of the Initial Administrative order.

Paragraph H. recites groundwater monitoring analyses commenced by Respondent in 1982. This data is supported by the record. As supplemented by Respondent's more recent groundwater monitoring data, [50] the record supports the conclusion that the RFI and CMS are necessary to protect human health and the environment.

Paragraph I. recites six hazardous waste spills that occurred in 1984. Respondent's Hearing Exhibit H-7 supplements other record evidence of the spills. The record supports this finding. In fact, two additional spills not listed in Paragraph I. occurred in 1984, according to the record.[51] The record also shows that Respondent promptly applied lime to the spill areas. Respondent has not shown grounds for modifying this finding.

Paragraph J. recited that the "Sharon Steel Corporation, RCRA Facility Assessment" (RFA) report dated July 22, 1988,[52] identified ten solid waste management units (SWMUs). The record shows that ten SWMUs and "potential SWMUS" were identified.[53] I direct modification of the Order to recite with more precision the identification of ten SWMUs and potential SWMUs in the RFA.

Paragraph K. recited that the substances found at the "Facility" and identified above (arsenic, cadmium, hexavalent chromium, lead, iron, oily sludge and spent pickle liquor) are hazardous wastes and/or hazardous constituents. Respondent disputed this finding on the grounds that "[i]ron, pH and oily sludge identified in Paragraphs C,D and H are not hazardous wastes nor hazardous constituents."

The term "substance" does not ordinarily include pH, a measurement of the acidity/alkalinity of other substances. Of the substances mentioned in the Initial Administrative Order, it is true that iron and oily sludge are neither listed hazardous wastes (40 C.F.R. Part 261, Subpart D) nor hazardous constituents (40 C.F.R. Part 261, Appendix VIII). But environmental monitoring data in the record show that pH, iron, oil and oily sludge from the Acid/Slag Disposal Area damaged both groundwater and surface waters.[54] The record supports the finding that iron and oily sludge are hazardous wastes as defined in Section 1004(5) of RCRA, 42 U.S.C. 6903(5), in that their quantity and physical characteristics may pose a substantial present or potential hazard to the environment. The acidity/alkalinity of any of the substances mentioned is a physical characteristic that may pose a substantial present or potential threat to human health or the environment.

Paragraphs L and M recited the human health and environmental impacts of certain of the substances discussed above. In its Response to the Initial Administrative Order, Respondent reserved its right to challenge these findings, but has not introduced into the record any evidence in support of its challenge. There is no evidence in the record to warrant a modification of these findings.

Paragraph N recites surface and groundwater flows from the facility to the Shenango River. In its Response, Respondent disputed these findings based upon its argument that the facility, consisited only of the Acid Slag Disposal Area. Applying the Petitioner's definition of facility, adopted above by the Presiding Officer, to descriptions of surface and groundwater flow in the record,[55] it is clear that groundwater flow from the facility is generally toward the Shenango River, that surface water runoff flows to the Shenango River, and that Yankee Run and Little Yankee Run (minor tributaries of the Shenango) carry drainage from the facility to the Shenango River.

Paragraph O describes potential human and environmental receptors near the facility. In its Response, Respondent challenged the finding that approximately 40 homes maintain private wells for domestic water

supply within a one mile radius of the facility and the finding that wetlands within a 1/4 mile of the facility have been covered with slag and further contaminated by acid discharges. Respondent challenged the specificity and the lack of data supporting these findings. As discussed above, to compel corrective action investigations or studies, EPA need only identify a general threat to human health or the environment, and the RFI will develop more specific data necessary for consideration in the CMS. For the purposes of this Order, the record supports these findings[56] .

Paragraph P recites the potential for further migration of substances discussed above to the potential human and environmental receptors. Respondent asserts that there is no record support for the finding that these substances have migrated from the Acid/Slag Disposal Area to any of the identified environmental receptors. As stated above, Petitioner need identify only a general threat to human health or the environment in this Order. The record supports the finding of potential migration.

C. Conclusions of Law. Section V. of the Initial Administrative Order recited Conclusions of Law and Determinations. In disputing Conclusions B., C. and E. Respondent reiterated its positions on the terms "facility," "hazardous wastes," and "actions ... necessary to protect human health and the environment." As discussed above, the record supports these conclusions of law.

D. Work to be Performed. Section VI. of the Initial Administrative Order describes the 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. Respondent disputes the breadth of the attachments and guidance and the discretion apparently retained by Petitioner to require additional measures, information and expenditures without consideration of Respondent's financial condition. Respondent cites other major environmental projects to which it is currently committed and the significant capital expenditures required to meet those commitments. In light of these considerations, Respondent requests specifically that it be given 180 days, rather than 60 days, to submit a description of current conditions at the facility and a pre- investigation evaluation of corrective measures technologies, and 240 days, rather than 60 days, to submit an RFI workplan. [57]

Section 3008(h)(2) of RCRA requires that an interim status corrective action order state "with reasonable specificity" the nature of the action to be taken. 42 U.S.C. 6928(h)(2). There is no express requirement that the financial condition of a person named in such an order be taken into account, nor is there an express requirement that the timing of required action be reasonable. Given the circumstances of this case, as reflected in the administrative record and in the parties' representations, I find no

basis for modifying this provision of the Initial Administrative Order.

E. Quality Assurance. Respondent disputes the requirement in paragraph VII.2. of the Initial Administrative Order that laboratories used by Respondent for analyses (under the order) participate in a quality assurance/quality control program equivalent to that which is followed by EPA. Respondent's objection is based upon cost. On its face, the challenged provision appears to be a reasonable exercise of the Agency's authority to implement a corrective action program under 3008(h) of RCRA. As discussed above, nothing in the statute requires that Respondent's financial condition be taken into account, and nothing in the record supports Respondent's assertion that "equally reliable analytical data may be obtained at lower cost." Accordingly, I find there is no record support for modifying this provision of the Initial Administrative Order.

F. On-Site Access. Respondent disputes Section IX. of the Initial Administrative Order because it places no time limits or notice requirements on Petitioner's access to the facility while the Order is effective. Given that this provision is not an exercise of EPA's statutory inspection authority, which Petitioner expressly reserved in Paragraph C. of this section of the Initial Administrative Order, I agree that Petitioner's access to the Farrell Works under the Order should be at reasonable times, and upon reasonable notice to the Respondent. Since the record does not include Respondent's visitors policy, compliance with it should not be required. I direct modification of this provision to authorize EPA access to the facility at reasonable times and upon reasonable notice.

F. Record Preservation. Respondent disputes Section XI. of the Initial Administrative Order insofar as it would require Respondent to preserve records not in its possession. Given that this provision is not an exercise of EPA's statutory authority, which Petitioner expressly reserved in this section, I agree with Respondent and direct that this provision be modified to require Respondent to preserve its own records and records not in its possession but under its control and to use its best efforts to ensure that records not in Respondent's possession be preserved as specified.

G. Amendments/Incorporation. Addressing Section XIX. of the Initial Administrative Order, Respondent disputes what it characterizes as "EPA's reservation of the right to unilaterally revise any of Sharon's Submissions pursuant to the Order and incorporate the revised Submissions into the Order." I believes that Paragraph XIX. A., as explained by Petitioner's representative at hearing, provides Respondent with an opportunity for a hearing under 40 C.F.R. Part 28 for any substantive modifications of Respondent's obligations under the Order. This is consistent with the approach the Agency's Environmental Appeals Board adopted in In The Matter of General Electric Company, RCRA Appeal No. 91-7, discussed at p. 23, above.

H. Termination and Satisfaction. Addressing Paragraph XXIII. of the Initial Administrative Order, Respondent disputes the absence of any limit on EPA's discretion to determine satisfactory completion of the requirements of the Order. Respondent requested that the Order state that "EPA may not unreasonably withhold its approval of the completion of the work," but offered nothing in support of this request. I believe that termination of the Order will be in both parties' interest when the work has been completed, that it is appropriate that the determination of completion be at Petitioner's discretion, and that this provision should not be modified.

PREVIOUS EPA ENFORCEMENT

Respondent did not make any reference in its Response to the previous EPA RCRA administrative complaint and subsequent consent agreement, EPA Docket No. RCRA-III-114. Respondent first attempted to raise this action as an issue in this proceeding in its Prehearing Submission[58] , suggesting that the Initial Administrative Order would interfere with and frustrate Respondent's compliance with its obligations under the consent order. Although this issue was not properly raised by the Respondent, it was addressed by the parties at the hearing. 59/ In short, the groundwater and surface water monitoring program, performed by Respondent in accordance with the consent agreement and final order in RCRA-III-114, and any other environmental monitoring activities conducted by Respondent at the Farrell Works, may be incorporated into the RFI. Compliance in RCRA- III-114 is not an adequate substitute for the RFI, but such compliance is in no way inconsistent with, or even necessarily redundant on, Respondent's RFI obligations. Thus, even if this issue had been properly raised by Respondent, I would find no grounds in the record to support withdrawal or modification of the Initial Administrative Order on this basis.

DIRECTIVES

On the basis of the administrative record in this proceeding, including the parties' comments on the Recommended Decision, I direct that the Initial Administrative Order issued September 23, 1992, be modified as follows:

1. From Section II-Parties Bound, delete:

> "and its successors and assigns," add: "any person or entity who, under applicable laws of corporate successorship, or any other law, succeeds to the liability of Respondent under the Final Order."

2. To Section IX-on-Site and Off-Site Access, add:

> "at reasonable times and upon reasonable notice" between "shall" and "have" in the first sentence.

3. From Section XI-Record Preservation, delete:

> "contractors, successors, and assigns" from the first sentence, and add, after "Facility,": "and shall ensure that any such records not in its possession but under its control are preserved as specified."

Dated: FEB 9 1994

/s________________
STANLEY L. LASKOWSKI
Acting Regional Administrator

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1. The Initial Administrative Order was erroneously captioned with EPA Docket Number RCRA-III-243-CA. The Presiding Officer later corrected this error with the appropriate EPA Docket Number: RCRA-III-062-CA.

2. The Initial Administrative Order did not specify whether a hearing, if requested, would be held under 40 C.F.R. Part 24, Subpart B or the more formal 40 C.F.R. Part 24, Subpart C, entitled "Hearings on Orders Requiring Corrective Measures." 40 C.F.R. 24.08 provides for the selection of appropriate hearing procedures, and there is no dispute that Subpart B procedures are appropriate under the regulations.

3. The Petitioner did not oppose this request. The Presiding Officer found that Respondent's grave financial condition, uncertain future, and in particular its inability to prepare for or perhaps even attend the hearing on November 23, 1992, constituted good cause for postponing the hearing. Counsel for Petitioner stated that Petitioner would not be prejudiced by the delay. On November 30, 1992, Respondent filed Chapter 11 bankruptcy papers in the United States Bankruptcy Court for the Western District of Pennsylvania, Erie Division. On January 14, 1993, the Court authorized Reed Smith Shaw & McClay to serve as co-counsel in this proceeding.

4.See 40 C.F.R. 24.10(b), Prehearing submissions by respondent.

5 The parties conducted settlement negotiations in a face-to-face meeting and telephone conferences and exchanged written proposals, between April and August of 1992. While some progress was apparently made during these negotiations certain fundamental differences remain, and there have been no settlement discussions since the issuance of the Initial Administrative order.

6. See 40 C.F.R. 24.11.

7. Response, p.5; See also Respondent's Prehearing Submission p.1 The Farrell Works are called "Victor Posner Works" in Respondent's Hazardous Waste Spill Reports, submitted to the Commonwealth of Pennsylvania and included in the Administrative Record (AR) AR 260002, 260005, 260009, 260012, 260014, 260017 and 260022; See

also AR280004-6, AR280001.

8. AR270008; Respondent's Prehearing Submission, p.17.

9. AR280006.

10. Respondent's prehearing submission Exhibit 1 is a site location map showing the relative positions of the steelmaking and finishing portion of the Farrell Works, the Shenango River and the Acid Slag/Disposal Area.

11. Petitioner's post-hearing submission p. 37.

12. Respondent's prehearing submission, p.2.

13. AR270011; AR280006; Respondent's prehearing submission, p.2.

14. AR270016; AR270238; AR270243.

15. AR270012; AR270015; AR270210; AR270211; AR270219; AR280015.

16. AR270012; AR270040; AR270093; AR270211; AR280015.

17. AR170012; AR270017; AR280008.

18. AR270008; AR270092; Respondent's prehearing submission, p. 1.

19. AR270011; AR270079; AR270092; AR270238; AR280015;AR280017.

20. Affidavit attached to November 12, 1992 letter from Respondent's counsel seeking postponement of the hearing.

21. Letter of Respondent's former (and future) counsel dated December 15, 1992. The bankruptcy proceeding (Bankruptcy Nos. 92-10958, 92-10959 and 92-10961) also involves Sharon Specialty Steel, Inc. and Monesson, Inc.

22. AR010002-AR010003.

23. AR010004.

24. AR030001-AR030011.

25. AR020001.

26. AR260001-AR260015.

27. Respondent's prehearing submission, Exhibit 9.

28. AR260016-AR260018.

29. Respondent's prehearing submission, Exhibit 9.

30. AR260021-AR260023.

31. AR 270072-AR270383.

32. AR270001-AR270071.

33. Respondent's prehearing submission, Exhibit 9.

34. AR010005-AR010006.

35. AR010007-AR010010.

36. In the Initial Administrative order Petitioner defined the facility as "the property on which the steelmaking facility is located, and all contiguous property under the ownership or control of Respondent."

37. Respondent is not presently "an owner or operator seeking a permit under Subtitle C of RCRA" for the Farrell Works. According to Petitioner, this phrase includes owners and operators of interim status facilities. Otherwise, corrective action could not be required at facilities not actively in the permit process. See Petitioner's Response to Respondent's Post-hearing Brief, p. 11, n.9. It is EPA's position that Section 3008(h) of RCRA is "...to deal directly with environmental problems by requiring cleanup at facilities that have operated or are operating subject to RCRA interim status requirements." Interpretation of Section 3008(h) of the Solid Waste Disposal Act, Memorandum issued by EPA's Assistant Administrators for Solid Waste and Emergency Response and Enforcement and Compliance Monitoring, December 16, 1985, at pp. 1, 11. (Complainant's Post-Hearing Brief, Attachment 3). Since Respondent has not raised this issue, the Recommended Decision does not address it.

38. As conceded by Petitioner in post hearing submission, the Commonwealth of Pennsylvania owns the stream beds of the rivers in the state in trust for the public. U.S. v. Pennsylvania Salt Manufacturing Company, 16 F. 2d 476 (D. Pa. 1926) and Rose v. Mitsubishi International Corporation, 423 F. Supp. 1162 (E.D. Pa. 1976). The Shenango River is a navigable waterway of the United States, so Pennylvania's title to the streambed is subject to a navigation servitude (a form of right of way).

39. The primary legal meaning of "contiguous" lands carries the idea that they actually touch or border each other, and implies more than a single point of contact, and thus contiguous tracts of land have one side, or at least a part of one side, in common. 17 Corpus Juris Secundum "Contiguous" 361-2 (1963 and Supp. 1992). There are legal settings in which a secondary meaning of "contiguous" has been

applied. In municipal annexation cases, and in cases involving apportionment of representatives to the legislature, "contiguous" has sometimes meant "close" or "near although not in contact." These interpretations of the term have been made to prevent illogical or inappropriate results. "...a city might annex territory on the opposite bank of a large river." Vestal v. City of Little Rock, 15 S.W. 891, 892 (Supreme Court of Arkansas, 1891); "...'contiguous' does not mean in contact with land. Certainly, so far as the islands are concerned, they may be considered contiguous, although separated by wide reaches of navigable deep waters. Isle Royal and other islands would go unrepresented if this were not so." Board of Supervisors of Houghton County v. Blacker, Secretary of State, 52 N.W. 951, 953 (Supreme Court of Michigan, 1892).

40. AR010001.

41. AR030008.

42. AR20001.

43. See also AR260001-260023.

44. AR260001-AR260023.

45. See Summary of Hearing at page 4; transcript of Hearing at page 96.

46. In the Matter of General Electric Company, Permit No. MAD 002 084 093, RCRA Appeal No. 91-7, decided April 13, 1993.

47. Transcript of Hearing, p. 243.

48. Response, p.9; Respondent's prehearing submission, p. 5.

49. Petitioner's Posthearing Brief, p. 7, citing 55 Fed. Reg. 30,808 (July 27, 1990).

50. Respondent's prehearing submission, Exhibits 10 and 11; Hearing Exhibit H-6.

51. AR260001-AR260023.

52. AR280001-AR280048.

53. AR280015; AR280017.

54. AR270180; AR270189; AR270195; AR270206.

55. AR270008; AR270017; AR270019; AR270161; AR280013; AR280022; AR280034.

56. AR270011; AR270091; AR270092; AR270094; AR280013.

57. Response, p. 18; Respondent's prehearing submission, p. 33 and Exhibit 14.

58. Respondent's prehearing submission, pp. ii, 10-12, 28, Exhibit 9.

59. Transcript of Hearing, pp.79-84, 110-114, 117, 166-169, 195-200.

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