# IN RE EXXON COMPANY, U.S.A.

RCRA Appeal No. 94-8

## *ORDER DENYING REVIEW IN PART AND REMANDING IN PART*

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Decided May 17, 1995

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### Syllabus

Exxon Company, U.S.A. challenges several conditions of a permit issued to it by U.S. EPA Region VI under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, for Exxon's petroleum refinery in East Baton Rouge Parish, Louisiana. The permit establishes corrective action requirements for twelve solid waste management units at the Baton Rouge refinery. Exxon contends that seven of the units addressed in the permit are not located at the RCRA "facility" to which the permit properly applies, because a railroad track running across the refinery property destroys the necessary "contiguity" between the portions of the refinery on one side of the track and those on the other. Exxon further contends that two of the units addressed in the permit (a set of API oil/water separators and an "aerobic digester") are exempt from HSWA regulation because they are "tanks," and that there is insufficient evidence to justify requiring the refinery sewer system to undergo an integrity check. Exxon also raises objections relating to the permit's dispute resolution provisions, to the requirement that Exxon notify the Region of any newly identified solid waste management units at the refinery, and to the permit provisions describing the elements to be included in any Corrective Measures Study that may be necessary for the refinery.

Held: The Region's conclusion that all portions of the refinery addressed in this permit are located at one RCRA "facility" is upheld. The areas of the refinery on either side of the railroad track are physically connected and thus "contiguous" with one another, allowing all of the units at issue to be regulated as a single RCRA "facility" pursuant to 40 C.F.R. § 260.10. The Region's characterization of the API separators and the aerobic digester as solid waste management units subject to corrective action is also upheld, as is the integrity check requirement applicable to the refinery's sewer system. The integrity check requirement for the sewer system is, however, remanded for clarification, because the permit does not sufficiently identify the limited nature of the investigation currently required for the sewer system. On remand, the Region will also be expected to address the significance, if any, of Exxon's contention that the sewer system is "segregated" in such a manner that discrete and identifiable portions of the system handle only stormwater (rather than refinery process wastewater). None of the other challenged permit conditions reflects a clear error of fact or law, and the petition for review is therefore denied in all other respects.

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

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

## I. *BACKGROUND*

Petitioner Exxon Company, U.S.A. (Exxon) appeals from an April 6, 1994 permit decision issued to it by U.S. EPA Region VI pursuant to the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*[1] The HSWA permit sets forth corrective action requirements for twelve solid waste management units (SWMUs) at Exxon's petroleum refinery situated alongside the Mississippi River in East Baton Rouge Parish, Louisiana.

Exxon contends that Region VI erred in including seven of the twelve units for action under the HSWA permit because those seven units — located on the eastern portion of the 1000-acre refinery property, on the opposite side of a railroad track from the only two hazardous waste management units regulated under the State-issued RCRA permit — are not part of the "facility" to which EPA's corrective action authority extends under RCRA § 3004(u). For three of those seven units, Exxon also contends that Region VI erred by designating them as units requiring a RCRA Facility Investigation (RFI),[2] on the grounds that they are exempt from HSWA corrective action requirements and/or that there is inadequate evidence to support the proposed RFI requirement.[3] Exxon also raises objections concerning the

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[1] The non-HSWA portion of the permit, issued by the Louisiana Department of Environmental Quality, is a post-closure permit governing two hazardous waste management units at the refinery — a five-acre surface impoundment and a fifteen-acre land treatment unit. The HSWA portion of the permit was issued by Region VI because, at all times relevant to the permit-issuance process, Louisiana was not authorized to issue permits for corrective action under HSWA. Louisiana became authorized to administer certain HSWA requirements during January 1995, *see* 60 Fed. Reg. 4380 (Jan. 23, 1995), but neither Exxon nor Region VI contends that the January 1995 authorization affects this appeal.

[2] The RFI is the first of the investigations conducted by a permittee (rather than by the permit issuer) during the corrective action process. The goal of an RFI is "to determine the extent and nature of any releases from SWMUs at the facility." *In re General Electric Company*, 4 E.A.D. 615, 617 (EAB 1993).

[3] The parties have reached agreement concerning three other SWMUs, and two areas of concern, that are listed in the HSWA permit as units for which an RFI is currently required. Specifically, the parties agree that no RFI is currently required for the units identified as SWMU Nos. 2, 17, and 34 (the "Dirty Water Detention Basin," the "Clean Master Separator," and the "Wet Gas Scrubber Pond," respectively), and for an area of concern identified as the "Drainage Ditch Property Purchased From Formosa." In addition, with respect to a second area of concern identified in the permit as the "Leaking Pump at Tank 474," the parties agree that no RFI will be required if certain recently conducted sampling procedures yield acceptable results. *See* Petitioner's Reply Brief in Support of Petition for Review, Exh. A. The permit conditions

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provisions of the HSWA permit that (1) establish an administrative mechanism for resolving any future disputes over the extent of the investigation Exxon must perform at the Baton Rouge refinery; (2) require notice to the Region of any newly identified SWMUs at the refinery; and (3) describe factors to be addressed in the portion of Exxon's Corrective Measures Study (if any) devoted to selection of a remedy. Region VI submitted a response to Exxon's petition for review on January 25, 1995, and Exxon submitted a reply brief on February 27, 1995. For the following reasons, the Board upholds the Region's permit decision in part and remands in part.

## **II.** *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to § 124.19 states that the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level." *Id.* The petitioner bears the burden of demonstrating that review is warranted. *See, e.g., In re Delco Electronics Corporation*, 5 E.A.D. 475, 477 (EAB 1994).

### A. *The RCRA "Facility"*

Exxon's first contention on appeal concerns the significance of a segment of Illinois Central Railroad track that crosses its refinery in a north-south direction. Exxon argues that the presence of the railroad track precludes Region VI from regulating the entire refinery as a single "facility." Because both of the hazardous waste management units (a surface impoundment and a land treatment unit) governed by the refinery's State-issued RCRA permit are located west of the railroad track, Exxon argues that the "facility" subject to regulation under HSWA includes only that portion of the refinery west of the track. Relying on the definition of "facility" provided in 40 C.F.R. § 260.10 — under which the "facility," for corrective action purposes, includes "all contiguous property under the control of the owner or operator seeking a permit under subtitle C of RCRA" — Exxon contends that (1) the portion of its refinery east of the track is not "contiguous" with the portion west of the track, (2) thus the refinery SWMUs east of the track are not part of the RCRA-permitted "facility," and (3) the eastern SWMUs are therefore not subject to corrective action under HSWA. Exxon believes, in other

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requiring performance of an RFI for these units (Permit Section VII, Table 2) are therefore remanded for revision in accordance with the parties' agreement.

words, that the portion of its refinery that is a "facility" under RCRA § 3004(u) ends at the western edge of the railroad track.

In advancing this argument, Exxon does not dispute that the refinery functions as a single integrated enterprise — with a unified sewer system collecting wastewater from the entire refinery, including areas east of the railroad track, and conveying those wastewaters directly to an on-site treatment plant located west of the track. Rather, Exxon argues only that the portions of the refinery on either side of the railroad track are not "contiguous property," and thus that only the western portion of the refinery (*i.e.*, the portion "seeking a permit" from the State under subtitle C) is subject to corrective action under RCRA § 3004(u).

Exxon's contention is without merit. The areas on either side of the railroad track are, in our view, very clearly "contiguous property." Not only is the land on one side of the track located immediately adjacent to the land on the other side, but the two areas are also physically connected for purposes specifically related to solid waste management; sewer pipes owned by Exxon traverse the track so as to unite Exxon-owned waste-generating activities on one side with Exxon-owned waste treatment facilities on the other. For these reasons, the areas on either side of the track are "contiguous" with one another according to the plain meaning of that term. *See Black's Law Dictionary* 290 (5th ed. 1979) ("contiguous" means "[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded or traversed by"). The "facility" definition set forth in 40 C.F.R. § 260.10 therefore, by its plain language, supports regulating the areas of Exxon's refinery on either side of the track as a single RCRA facility.

The Administrator, moreover, has previously considered and rejected an argument essentially identical to Exxon's. In *In re Navajo Refining Company*, 2 E.A.D. 835 (Adm'r 1989), a refinery operator challenged the application of corrective action requirements to three evaporation ponds that, although located at a distance of three miles from the main portion of the refinery, were "physically connected" to the refinery by a drainage ditch used to convey wastewater from the refinery to the ponds. The Regional Office argued, in *Navajo*, that "the ponds [are] contiguous to, and thus a part of, the facility because they are physically connected to the rest of the refinery by the ditch," *id.* at 836, and the Administrator agreed. *Id.* at 836-837. The same "physical connection" exists here in the form of a network of sewer pipes crossing under the railroad track and conveying refinery wastes from one side to the other. The existence of the requisite "contiguity" is, if anything, considerably more obvious here than it was in *Navajo*.

Exxon contends, however, that *Navajo* has been implicitly rejected, and a narrower interpretation of "contiguous property" adopted, by a passage appearing in the preamble to EPA's proposed Subpart S corrective action regulations. The passage cited by Exxon states:

> Several questions have been raised as to the Agency's interpretation of "contiguous property" in the context of defining the areal limits of the facility. *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.

*Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities* (Preamble), 55 Fed. Reg. 30,798, 30,808 (July 27, 1990) (emphasis added). Relying on the highlighted sentence, Exxon argues that the Illinois Central track running across its property constitutes "land owned by others,"[4] and that the refinery property east of the track is therefore not "contiguous" with the refinery property west of the track.

We disagree with Exxon's reading of the preamble discussion. Indeed, contrary to Exxon's interpretation, the preamble excerpt cited by Exxon actually supports the view that Exxon's entire refinery is properly treated as a single "facility." The land on one side of the track is not in any practical sense "located apart" from the land on the other, nor does the track in any practical sense serve to "separate" one area from the other. The track, instead, is comparable to a roadway or a power transmission right-of-way, cited in the preamble to illustrate the kinds of structures or property arrangements that will not interrupt the "contiguity" between one portion of an otherwise integrated facility and the rest.[5]

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[4] Although Exxon claims that the strip of land on which the track sits is owned by the Illinois Central Railroad "in fee simple," Petition for Review, at 6, that does not affect our analysis of Exxon's claim that the portions of the refinery on either side of the strip are non-contiguous. Among other things, Exxon's description of the track's ownership fails to account for the fact (not disputed by Exxon) that its own sewer system crosses under the track and thus occupies a portion of the underlying strip. Presumably Exxon is not trespassing, but holds some form of property interest or license allowing it to use the strip in that manner.

[5] Further, if Exxon's reading of the preamble were to prevail, a facility owner could rid itself of unwanted corrective action responsibilities simply by yielding control over a narrow strip of land within a functionally integrated facility, keeping all of the hazardous waste treatment, storage or disposal activities on one side of the strip and creating a second "facility" on the other

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Accordingly, we deny the petition for review insofar as it challenges the applicability of RCRA § 3004(u) to the portion of Exxon's Baton Rouge refinery east of the Illinois Central Railroad track.

B. *SWMU Designations*

1. *API Separators and Aerobic Digester (SWMUs 19 & 13)*

The HSWA permit identifies a group of twelve API oil/water separators at the refinery as a solid waste management unit (SWMU No. 19*a*-19*l*) for which an RFI is required. Two of the twelve oil/water separators have also been separately designated as SWMU No. 13 (the "aerobic digester") because they have been modified to serve the distinct function of receiving and aerating the refinery's "dissolved air flotation float." With respect to all of the API separators, including those functioning as the aerobic digester, Exxon stated in its comments on the draft permit that the units are not properly regarded as SWMUs because they "meet the definition of a tank and thus [are] exempted from current RCRA standards." Comments on the Draft HSWA Permit, Attachment 2, at 5.

Although Exxon cites no regulatory provisions in support of this argument, we assume that the argument relates to 40 C.F.R. §§ 264.1 (g)(6) and 260.10. Section 264.1(g)(6) states that the requirements of 40 C.F.R. Part 264 do not apply to "[t]he owner or operator of * * * a wastewater treatment unit as defined in § 260.10 of this chapter." Section 260.10, in turn, defines "wastewater treatment unit" in terms of three required elements, one of which is that the device in question "[m]eets the definition of tank or tank system in § 260.10 of this chapter." Thus, the significance of Exxon's characterization of the API separators as "tanks" is, presumably, to suggest that they are exempt from RCRA subtitle C operating standards, pursuant to 40 C.F.R. § 264.1 (g)(6), because they are "wastewater treatment units." *Cf. Beazer East Inc. v. EPA*, 963 F.2d 603 (3d Cir. 1992) (adjudicating a similar claim of exemption under an analogous provision of the RCRA interim status regulations, 40 C.F.R. § 265.1(c)(10)).

The assertion that the API separators are "tanks" is simply not relevant, however, to the question whether they are subject to corrective action under RCRA § 3004(u). Section 3004(u) requirements apply to the separators if they are "solid waste management units" at a facility seeking a permit under section 3005(c) of RCRA, whether or not they

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side, where any releases from solid waste management units would go unregulated. We decline to adopt a strained and artificial interpretation of "contiguous property" that, by encouraging such behavior, would thwart the regulatory objectives underlying HSWA.

are exempt from the Part 264 standards governing hazardous waste management units. Indeed, when EPA codified the general corrective action mandate at 40 C.F.R. § 264.101, it specifically stated that exemptions from the RCRA standards governing operation of hazardous waste management units — such as the exemption for "wastewater treatment units" under section 264.1(g)(6) — would not exempt those units from otherwise applicable HSWA corrective action requirements:

> EPA has in the past considered developing special standards for certain types of units and has temporarily exempted classes of units from the substantive standards applicable generally to hazardous waste management units. For example, there are such exemptions for recycling units (§ 261.6) and for tanks qualifying as "wastewater treatment units" (§ 264.1(g)(6) and § 265.1(c)(10)). Such units are solid waste management units under RCRA and thus are subject to Section 3004(u).

*Final Codification Rule* (Preamble), 50 Fed. Reg. 28,702, 28,712 (July 15, 1985). Accordingly, Exxon's assertion that the API separators are "tanks" implies nothing about their status as solid waste management units — defined in the permit, in relevant part, as "any discernible unit at which solid wastes have been placed at any time."[6]

In responding to Exxon's comments on the API separators and the aerobic digester, the Region stated:

> These units were included in the RFI for integrity checks because they handle large volumes of wastewater reported in the Part B application to contain lead and chromium. They are constructed of concrete and are reported to have been in operation since early in the life of the refinery which commenced operation in about 1909.

Response to Comments, at 60. Exxon has not disagreed with that description of the units, and has consequently provided us with no basis for questioning their designation as SWMUs. *See In re LCP Chemicals - New York*, 4 E.A.D. 661, 664 (EAB 1993) (petition for review must articulate, with specificity, how the Region's response to

[6] Although Exxon did not timely raise any issue as to whether refinery process wastewaters such as those placed in its API separators are "solid waste," we note that the Agency has recently reaffirmed that they are. *See Amendments to Definition of Solid Waste* (Preamble), 59 Fed. Reg. 38,536, 38,539-41 (July 28, 1994).

an objection previously raised during the comment period is erroneous). Accordingly, we deny review with respect to the permit's characterization of the API separators and the aerobic digester as solid waste management units for which an RFI is required.[7]

2. Sewer System (SWMU 43)

The HSWA permit identifies the Exxon refinery's "Facility-Wide Sewer System" as a solid waste management unit (SWMU No. 43) for which an RFI is required. Exxon raises two issues in connection with this requirement. First, Exxon objects that no RFI should be required because "there is no confirmed evidence of a release" from the sewer system. Exxon Comments on Table 2 of Section VII, Comment No. 9. Second, Exxon contends that the refinery sewer system is "segregated into process sewers and stormwater sewers"; consequently, Exxon argues, "identifying the entire sewer system into the RFI process is unwarranted and without justification." *Id.*

Exxon's first argument relates to an issue that the Agency has previously addressed in connection with several other petroleum refineries seeking permits under HSWA. *See In re Amoco Oil Company*, 4 E.A.D. 954 (EAB 1993); *In re Chevron USA Inc.*, RCRA Appeal No. 89-26 (Adm'r, Dec. 31, 1990); *In re Texaco Refining & Marketing, Inc.*, 3 E.A.D. 364 (Adm'r 1990); *In re Shell Oil Company*, 3 E.A.D. 116 (Adm'r 1990). As these cases demonstrate, EPA has consistently taken the position that industrial process sewers generally, and those at petroleum refining facilities in particular, are properly regarded as "solid waste management units" for purposes of RCRA corrective action.[8]

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[7] In its petition for review, Exxon also argues that there is insufficient evidence of any release from the separators or the aerobic digester to justify the RFI requirement imposed by the HSWA permit. Petition for Review, at 12. That specific objection was not, however, raised in Exxon's comments on the draft permit, and the objection is therefore waived and will not be considered on appeal. For the same reason, we do not consider the argument, raised for the first time in Exxon's reply brief on appeal, that the separators are not SWMUs because they "do not manage solid waste." Reply Brief in Support of Petition for Review, at 14. *See* 40 C.F.R. § 124.13 (persons objecting to any provision of a draft permit "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period"); § 124.19(a) (requiring "a demonstration that any issues being raised [on appeal] were raised during the comment period"); *see also, e.g., In re Amoco Oil Company*, 4 E. A.D. 954, 975 (EAB 1993) (applying sections 124.13 and 124.19(a)).

[8] *See also* 55 Fed. Reg. 30,798, 30,809 (July 27, 1990) ("The Agency believes that there are sound reasons for considering process collection sewers to be solid waste management units. Such units typically handle large volumes of waste on a more or less continuous basis, and are an integral component of many facilities' overall waste management system. Program experience has further indicated that many of these systems, especially those at older facilities, have

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The cases make clear, moreover, that Exxon's suggestion that no investigation of a sewer system can be required absent "confirmed evidence of a release" is mistaken:

> To require an owner/operator to conduct further investigation of a SWMU, the Region need not have conclusive evidence of a release, but instead only evidence of a likely or suspected release. The strength of the evidence will determine whether the permit should require a full-scale RFI to determine the extent of the release, or, on the other hand, verification monitoring with further investigation only if a release is confirmed.

*Shell Oil*, *supra*, at 119 (footnote omitted). The question we consider, therefore, is whether the record includes sufficient evidence of a "likely or suspected release" from the Exxon refinery's sewer system to support the imposition of the proposed RFI requirement.

With respect to that question, the Region points to a recommendation appearing in the RCRA Facility Assessment (RFA) report for this facility.[9] The Region states:

> The facility wide sewer system conducts very large volumes of waste water. EPA's RFA contractor recommended that an integrity check be made of the system because its age and type of construction were not specified at time of the RFA inspection.

Response to Comments on the Draft Permit, at 64; Response to Petition for Review, at 12-13. In its comments and in its petition for review, Exxon has not addressed the RFA contractor's concerns by supplying any information regarding the sewer system's age or man-

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significant leakage, and can be a principal source of soil and ground-water contamination at the facility."). Exxon belatedly argues (Reply Brief, at 12) that its sewer system is part of the refining process, and that the wastewaters conveyed through the sewer pipes are not properly regarded as solid waste, but the Agency has considered and rejected similar contentions advanced by the petroleum industry in the context of a recent rulemaking. *See* 59 Fed. Reg. at 38,539-41 (affirming that petroleum refinery process wastewaters are "solid waste").

[9] An RFA is the first step in the corrective action process, preceding the issuance of a RCRA permit. "The RFA includes: (1) A desk top review of available information on the site; (2) a visual site inspection to confirm available information on solid waste management units at the site and to note any visual evidence of releases; and (3) in some cases, a sampling visit, to confirm or disprove suspected releases." 55 Fed. Reg. at 30,801. Based on the record before us on appeal, it does not appear that the RFA for Exxon's Baton Rouge refinery included sampling in the areas affected by suspected releases.

ner of construction. Rather, Exxon criticizes the Region for "not obtaining the information EPA needed to make a finding of fact," and then for not "construing the matter in Petitioner's favor * * * in the absence of data." Petition for Review, at 15.

We agree with the Region that the available information will support only a negative inference concerning the sewer system's integrity, and that the performance of an "integrity check" is therefore justified. The record indicates that portions of this facility have been in operation as a petroleum refinery since 1909, *see* Petition for Review, at 5; Response to Comments, at 60, and that "the integrity of the [sewer system] could not be observed" by the RFA contractor during a visual inspection of the facility. Response to Petition for Review, at 14 (quoting RFA Report, at 8-43). Moreover, the Agency's experience with industrial process sewer systems generally, as reported in the preamble to the proposed Subpart S regulations, has been that "many of these systems, especially those at older facilities, have significant leakage, and can be a principal source of soil and ground-water contamination at the facility." 55 Fed. Reg. at 30,809. The site-specific evidence in this case is sufficient, when considered in the context of the RCRA program's experience with similar units at other facilities, to justify a requirement for further investigation of Exxon's facility-wide sewer system. *See Shell Oil, supra*, at 120 (further investigation warranted where "[p]ortions of the sewer system were constructed as far back as 1955"); *Texaco Refining & Marketing, supra*, at 366 n.4 (further investigation warranted where "[t]he sewer system [was] 30 years old, without having had integrity or leak testing, and with maintenance only during turn-around or construction involving excavation of sewer pipes").

The permit should, however, clearly state that only an integrity check of the sewer system is being required at this time. As of now, the permit simply lists the sewer system as one of several "SWMUs Requiring an RFI," suggesting, incorrectly, that known or suspected releases from the sewer have already been identified and that a full-scale investigation is currently required. We therefore remand the permit condition requiring further investigation of the facility-wide sewer system, for clarification of the scope of the investigation currently required. On remand, the Region should also take the opportunity to address the significance, if any, of Exxon's contention that SWMU No. 43 is "segregated" into portions handling refinery process wastewater and portions handling only stormwater. Presumably, in examining the integrity of the sewer system, the Region will be able to determine more precisely which portions, if any, require further investigation and study.

C. *Dispute Resolution*

Section VII.I.4 of the HSWA permit creates a mechanism for resolving any disputes that may arise from a Regional staff decision to disapprove or modify any of the "interim submissions" defining the scope of the investigative work required at this facility. Exxon objects to three specific aspects of the dispute resolution clause, as follows.[10]

1. *Scope of Stay.* The dispute resolution clause proposed by Region VI provides that "[n]otwithstanding the invocation of this Dispute Resolution procedure, the Permittee shall proceed to take any action required by those portions of the submission and of the Permit that EPA determines are not substantially affected by the dispute." In its petition for review, Exxon objects to this provision on the grounds that it "affords EPA too much discretion" and that "vesting EPA with discretion to decide what is 'substantially affected' by the dispute is a denial of due process under the law." Petition for Review, at 24.

This Board recently upheld an identically worded provision in *In re Delco Electronics Corp.*, 5 E.A.D. 475 (EAB 1994). In *Delco*, we concluded that the "substantially affected" standard represents a reasonable and workable yardstick for determining which conditions are and are not stayed pending resolution of a dispute:

> The permit reasonably requires compliance with portions of the submission and of the permit that the Region concludes are not "substantially affected" by the dispute. [Petitioner] does not propose an alternative standard, and the Region correctly notes that this is just the kind of determination that the Regions routinely make whenever a permit appeal is filed with this Board under the procedures in Part 124. *See* 40 C.F.R. § 124.16(a)(2) ("Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. Stayed conditions of permits * * * shall be identified by the Regional Administrator.").

[10] In its petition for review, Exxon also objected to permit language indicating that the outcome of the dispute resolution process "does not constitute final agency action for purposes of judicial review." Petition for Review, at 22. The Region has agreed to delete that language (*see* Response to Petition for Review, at 19-21), and we therefore remand the dispute resolution clause to the Region for that purpose. In doing so, we do not express any view concerning the merits of Exxon's objection, and we specifically do not suggest that the outcome of the dispute resolution process *does* constitute "final agency action." The Board has previously held that a dispute resolution clause need not affirmatively characterize the Region's decision as "final agency action," *see In re General Electric Company*, 4 E.A.D. 615, 637 (EAB 1993), and nothing in today's decision should be construed to cast doubt on that holding.

*Id.* at 486 n.12. Nothing in Exxon's petition persuades us that *Delco* was wrongly decided, and we therefore reaffirm our conclusion that a "substantially affected" standard for determining the conditions that are stayed by a dispute is not clearly erroneous.

Aside from the standard itself, Exxon also objects to the authority allegedly granted to the Region to make a "*unilateral* decision as to what items are in dispute." Reply Brief in Support of Petition for Review, at 15 (emphasis in original). Exxon argues that the scope of a dispute "*should be clear from the record concerning the dispute and if not, the courts and not EPA should decide the matter.*" Petition for Review, at 25 (emphasis in original). We do not agree that the provision at issue establishes a "unilateral" decisionmaking procedure for those unusual cases where there is disagreement over the scope of a dispute. The whole point of dispute resolution provisions such as these is to provide an opportunity for the permittee to have its disagreements with the Regional staff heard and decided, at the administrative level, in a manner consistent with due process. If a disagreement arises concerning the scope of a dispute previously submitted for resolution, that disagreement would itself be addressed not "unilaterally," but rather through the administrative dispute resolution framework established in the permit. The Region must ultimately make a determination with regard to the scope of a dispute, just as it makes the determination with regard to the merits of the dispute. *See In re General Electric Company*, 4 E.A.D. 615, 637-639 (EAB 1993). As *General Electric* makes clear, the Region's exercise of such decisionmaking authority is permissible following an opportunity for an administrative hearing. *Id.* We therefore deny the petition for review to the extent that it challenges the Region's authority to make a decision concerning which permit conditions are and are not stayed pending resolution of a dispute over an interim submission.

2. *Extension of Stay Pending Judicial Review.* In another attempt to secure the insertion of permit language endorsing judicial intervention in disputes over interim submissions, Exxon requests "that language be added to [the dispute resolution clause] to make clear that appeal of the Hazardous Waste Management Division Director's decision to Federal Court will stay the disputed item until a final decision is rendered by the courts." Reply Brief in Support of Petition for Review, at 15. That request provides no basis for granting review, because, as we have already made clear in a number of cases, the Board does not regard the Region's final decision on a dispute over an interim submission as a matter that is immediately appealable to the judicial system:

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

*In re Allied-Signal Inc. (Elizabeth, New Jersey)*, 5 E.A.D. 291-300 (EAB 1994). *See also General Electric*, *supra*, at 637-639; *Amoco Oil Company*, *supra*, at 6. Exxon suggests no basis for reconsidering those decisions, and its request for permit language essentially authorizing an immediate appeal to the courts is therefore denied.

3. *Conference with Division Director.* The dispute resolution clause proposed by Region VI would allow Exxon to meet, upon request, with members of the RCRA Permits Branch staff for the purpose of resolving a dispute over the Region's disapproval or modification of an interim submission. The dispute resolution clause would further allow Exxon to submit written arguments to the Region's Hazardous Waste Management Division Director (the Regional official authorized to issue RCRA permits) and to obtain a final written decision from the Division Director. Exxon can also request a meeting with the Division Director, but the Region will not be required to convene such a meeting upon request. Rather, a decision whether or not to allow Exxon's representatives to confer directly with the Hazardous Waste Management Division Director will be a matter committed to the Region's discretion.

On appeal, Exxon urges that it be allowed to meet with the Hazardous Waste Management Division Director as a matter of right. Reply Brief in Support of Petition for Review, at 16. The Board has rejected such demands in a number of its previous opinions:

> Our cases uniformly hold that due process is satisfied by providing a permittee with the opportunity to (among other things) "submit comments to, and meet with, the regional permitting staff responsible for making any disputed revisions," and then to "submit written arguments and evidence to the person in the Region with the authority to make the final permit decision."

*Delco Electronics*, *supra*, at 484 (quoting *Amoco Oil Company*, at 6). Our cases have declined to require the Regional Offices to convene

face-to-face meetings between the permittee and the final decisionmaker as a matter of right. *See General Electric, supra*, at 639 ("An oral presentation to the final decisionmaker * * * would not significantly reduce the risk of an erroneous determination, and any effect it would have would be outweighed by the real (albeit modest) burden on the Agency of providing for such oral presentation."). Exxon suggests no grounds for reexamining the issue, and its request for review on that basis is therefore denied.

D. *Newly Identified SWMUs*

Section VII.K of the HSWA permit ("Notification Requirements for and Assessment of Newly-Identified SWMUs") requires Exxon to report certain information to the Region within thirty days after Exxon's discovery of "any newly-identified SWMU (i.e., a unit not specifically identified during the RFA)." Exxon contends that it is not appropriate to use the term "SWMU" in describing the kind of discovery that triggers this reporting requirement. Exxon believes that the term "SWMU" is not sufficiently clear to allow "engineers and business people" to ascertain when a reportable discovery has occurred. Exxon therefore requests that section VII.K be redrafted so as to state that the specified information must be reported upon discovery of "any newly-identified unit(s) where [or 'at which'] Permittee determines solid wastes have been routinely and systematically released." Petition for Review, at 27-28; Reply Brief in Support of Petition for Review, at 16-17.

Exxon's proposed language is underinclusive. As the Board has previously held, the universe of potential "SWMUs" is broader than the category of units at which "routine and systematic" solid waste releases are known to have occurred. In *In re General Motors Corporation, Inland Fisher Guide Division*, 5 E.A.D. 400 (EAB 1994), we observed that EPA's proposed Subpart S definition of "solid waste management unit"[11] includes, by its terms, not only "any area at a facility at which solid wastes have been routinely and systematically

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[11] The "SWMU" definition in section VII.A of Exxon's HSWA permit is derived from proposed 40 C.F.R. § 264.501, which states:

> *Solid Waste Management Unit* means any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

55 Fed. Reg. at 30,874.

released," but also "any discernible unit at which solid wastes have been placed at any time." We therefore held that the reference to "routine and systematic releases" in the second sentence of the definition in no way limits the generality of the definition's first sentence, but rather, on the contrary, "serves to extend the definition of SWMU to areas not meeting the test of 'any discernible unit at which solid wastes have been placed.'" *General Motors*, *supra*, at 406. Accordingly, revising section VII.K in the manner requested by Exxon would serve to limit, in contravention of established precedent, the reporting obligation that the section is designed to impose. The section as written, in combination with the definition of "Solid Waste Management Unit" appearing in section VII.A of the HSWA permit, provides Exxon with adequate notice of what is required. The challenged provision is not clearly erroneous or otherwise worthy of review, and Exxon's request for review of section VII.K of the HSWA permit is therefore denied.

E. *Contents of Corrective Measures Study*

Finally, Exxon raises an objection concerning the provisions of the HSWA permit describing the "scope of work" to be undertaken in performing a Corrective Measures Study (CMS), if any such study is necessary, and in preparing a CMS report.[12] Among the steps involved in the CMS process, as described in section VII.W.4 of Exxon's HSWA permit, are (1) the evaluation of several corrective measures alternatives, and (2) the selection of one or more corrective measures alternative(s) for implementation. Although the "evaluation" step explicitly requires a comparative analysis of the costs of the alternative remedies being studied, the permit's description of the remedy "selection" step does not mention any consideration of cost. Exxon contends that cost must be considered in both portions of the CMS.

We addressed a very similar concern in our recent opinion in *Delco Electronics*, in which a HSWA permit condition stated that the Regional Administrator would select for implementation one or more corrective measures in the permittee's CMS report, "based on performance, reliability, implementability, safety, and human health and environmental impact of the measure or measures." *Delco Electronics*, at 487. We concluded that the permit language did not accurately reflect the approach to remedy selection outlined in a proposed

[12] The Region's response to Exxon's petition does not address this issue at all, and the issue does not reappear in any form in Exxon's reply brief. Nonetheless, the Board has received no indication that the issue has been resolved and the Board is therefore compelled to address it.

Agency rule, 40 C.F.R. § 264.525, 55 Fed. Reg. at 30,877,[13] and we therefore remanded the condition for revision in a manner consistent with the proposed rule. *Delco Electronics*, at 487-489.

By contrast, we do not believe revision of the permit is necessary in the present case, because the challenged permit provision here, unlike that in *Delco*, does not purport to describe the remedy selection process that the Region will follow. Rather, it merely establishes the minimum requirements for an acceptable Corrective Measures Study. Exxon is free to exceed the requirements established in section VII.W.4 by including in its remedy selection proposals an analysis of cost considerations or of any other factors that it wants the Region to consider. The Region must still make *its* decision through a process consistent with the Agency's proposed rule, or else articulate a reasoned justification for doing otherwise.[14] Exxon's request for review of the Corrective Measures Study provisions of the HSWA permit is denied.

## III. *CONCLUSION*

We remand the HSWA permit's requirement for performance of a RCRA Facility Investigation at the Facility-Wide Sewer System (SWMU No. 43) for further proceedings consistent with this opinion.[15] We also remand the HSWA permit's requirement for performance of a RCRA Facility Investigation at SWMUs 2, 17, and 34, and at the "Drainage Ditch Property Purchased From Formosa" and the "Leaking Pump at Tank 474," for implementation of the parties' agreement regarding those units, and we remand section VII.I.4.e of the HSWA permit (sub-

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[13] Under the proposed rule, the Regional Administrator's selection of a remedy proceeds in two stages. The Regional Administrator first considers the proposed remedies for consistency with four minimum standards: (1) Protection of human health and the environment; (2) Attainment of media cleanup standards; (3) Control of the source(s) of releases; and (4) Compliance with waste management standards established elsewhere in Subpart S. If, but only if, two or more of the remedies examined have been determined to meet those minimum standards, the Regional Administrator then considers five additional "remedy selection factors," one of which is relative cost.

[14] The permit requires Exxon to "develop an estimate of the cost of each corrective measures alternative" for inclusion in the CMS Final Report. Permit §§ VII.W.4.d, VII.W.5.d. The Region will therefore, in any event, have cost information available to it for consideration in connection with the selection of a remedy.

[15] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *See, e.g., Amoco Oil Company, supra*, at 982 n.38.

section e of the dispute resolution clause) for revision in accordance with the agreement discussed in footnote 10 of this opinion. No further appeal to this Board will be required to exhaust Exxon's administrative remedies under 40 C.F.R. § 124.19(e). In all other respects, the petition for review is denied.

So ordered.