UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

IN THE MATTER OF:	)	DOCKET NO. RCRA 3008(h)-VIII-95-02
	)	
Amoco Oil Company	)	Proceeding under Section
	)	3008(h) of the Resource
Respondent	)	Conservation and Recovery Act,
	)	as Amended, 42 U.S.C. § 6928(h).

RECOMMENDED DECISION

I. INTRODUCTION

On November 18, 1994, the United States Environmental Protection Agency ("EPA", or the "Agency"), Region 8, issued an Initial Administrative Order (the "Initial Order" or "Order") pursuant to § 3008(h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(h), to the Amoco Oil Company, Inc., Casper Refinery (the "Respondent", "Amoco" or "Amoco Oil"). The Wyoming Department of Environmental Quality ("WDEQ") was signatory to this Order. The Order requires the Respondent to initially conduct a Current Conditions/Release Assessment ("CC/RA") for the Facility. Upon completion of the CC/RA the Respondent is required to undertake a RCRA Facility Investigation ("RFI") and Corrective Measures Study ("CMS") to develop recommendations for appropriate corrective measures. The authority to issue the Order is delegated from the Regional Administrator to the Director of the Hazardous Waste Management The WDEQ has separate authority to enforce Division, Region 8. the Order.

This proceeding is governed by regulations set forth under 40 CFR, Part 24.

II. PROCEDURAL HISTORY

On December 23, 1994, the Amoco Oil Company ("Amoco") filed a Preliminary Response to Initial Administrative Order and Request for Hearing ("Response") to the subject Order. The Respondent contested nearly all provisions of the Order. On April 27, 1995, the Presiding Officer issued an Order scheduling a hearing for May 31, 1995. On May 19, 1995, Amoco filed a Motion to Dismiss alleging among other things lack of jurisdiction.[1] On May 22, 1994 Amoco filed a pre-hearing brief in accordance with an Order of the Presiding Officer. On May 24, 1995, EPA filed its pre-hearing brief. A hearing was held on May 31, 1995, in the EPA Region 8 Conference Center, at 999 18th Street, Denver, Colorado 80202. The Hearing was transcribed by a Court Reporter. On July 24, 1995, both parties filed post-hearing briefs. On August 8, 1995, EPA filed an errata sheet to its Post-hearing brief. For the reasons set forth below I recommend that the terms of the Order be modified.

III. FACILITY DESCRIPTION

The Amoco Oil Company ("Amoco") is a corporation organized under the laws of the State of Maryland, and is authorized to do business in the State of Wyoming. Amoco owns a site at which it

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[1]Motion of Amoco Oil Company to Dismiss Proceeding for Lack of Jurisdiction and to Require Withdrawal or Dismissal of Initial Administrative Order ("Motion to Dismiss"), May 19, 1995.

formerly operated a refinery ("former refinery"), located for the most part on the south bank of the North Platte River in the western portion of the City of Casper, Natrona County, Wyoming. The former refinery encompasses approximately 455 acres, which includes north and south properties, divided by the North Platte River.

A portion of the former refinery, Soda Lake, is located approximately 3 miles northeast of the above described operations portion of the refinery. Soda Lake is contained in a natural surface depression and occupies an area of approximately 1 square mile. Soda Lake is connected to the rest of the refinery by a wastewater pipeline. The lake received all the refinery's wastewater until September 25, 1990. These wastes included API separator effluent, sanitary sewage and softener sludge. A 1 to 2 foot thick sludge layer exists on the bottom of the settling basin. Sampling and analysis of the Soda Lake inlet basin water and sludge conducted in May and June 1990, indicated that oil and grease is present in concentrations of up to 43,000 mg/kg. Benzene, carbon tetrachloride, chloroform, tetrachloroethylene and 1,1-dichloroethylene were also found in these samples. Water samples were analyzed and were found to contain chloroform, methyl ethyl ketone, and lindane.

Associated with Soda Lake is a Caustic Pit located on property contiguous to Soda Lake (northeast of Soda Lake). The Soda Lake Caustic Pit is a bermed, earthen impoundment approximately 1000 square feet in size. Caustic soda solutions

were disposed in this unit between 1960 and 1970. The caustic soda solution is a hazardous waste based on the characteristic of corrosivity, because of the alkaline nature of the solution (D002).

From approximately 1913 to December 1991, Amoco was engaged in refining operations at the Facility, including processing crude oil into unleaded premium and regular gasoline, leaded regular gasoline, aviation 80/87, aviation 100/130, aviation-jet, diesel #1, diesel #2, premier diesel (50 cetane), railroad 40 diesel, decanted oil-fuel oil, plant fuel oil naphtha solvent, propane - LPG, plant fuel gas and lube oils. In December 1991 Amoco ceased refining operations, at its Casper Refinery.

During the 1920's Amoco constructed a series of oil reclamation ditches between the former refinery and the North Platte River. The purpose of the ditches was to intercept any release of petroleum products that migrated on the ground water towards the river. In 1979, Amoco installed two large-diameter steel wells to determine the recoverability of light non-aqueous phase liquids ("LNAPLs") from the groundwater. In 1981, Amoco installed a system of fifteen wells in the northeast corner of the former refinery to contain and recover LNAPLs. This barrier well system has operated continuously since 1981. To date, the total LNAPL recovery at the former refinery is, according to Amoco; approximately 10 million gallons.

On August 13, 1980, pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, Amoco notified EPA of its hazardous waste activity

at the Facility. In its notification, Amoco identified itself as: a generator of hazardous waste; and owner and operator of a treatment, storage, and/or disposal facility for hazardous waste; and as a transporter of hazardous waste.

The drum storage area was identified as a hazardous waste management unit at the Facility. This unit was certified closed on December 29, 1989.

Since the Casper refinery: (1) was in existence on November 19, 1980; (2) has complied with the requirements of section 3010(a) of RCRA; and (3) made an application for a permit under section 3005 of RCRA, it is treated as having been issued a permit ["interim status"] until such time as final administrative disposition of such application is made".... [2]

IV. **BASIS FOR ISSUING ORDER**

Section 3008(h)(1) provides:

> "(1) [w]henever 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 [interim status], the Administrator may issue an order requiring corrective action or such other response measures as he deems necessary to protect human health or the environment ...."
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> "(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under Section 3005(e) of this subtitle, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance ...."

[2]RCRA, Section 3005(e)(1) , 42 U.S.C. §6925(e)(1)

A Memorandum from the Assistant Administrator Office of Solid Waste and Emergency Response, J. Winston Porter, Interpretation of Section 3008(h) of the Solid Waste Disposal Act, dated December 16, 1985, ("the Porter Memo") set forth EPA's interpretation of the above statutory provisions. The elements of a 3008(h) corrective action Order, as interpreted by this memo, as they apply to the subject Facility, are discussed below, in detail:

A. WHENEVER ON THE BASIS OF ANY INFORMATION.

Section 3008(h) states that the Administrator may issue an order requiring corrective action or such other response measures as he deems necessary to protect human health or the environment, whenever on the basis of any information [he] determines that there has been a release of hazardous waste into the environment.

Appropriate information can be obtained from a variety of sources, including data from laboratory analyses of the soil , air, surface water or ground water samples, observations recorded during inspections, photographs, and facts obtained from facility records. Porter Memo at 4.

In the instant case, the Administrative Record is replete with information supporting the determination. For example Document # 1, consists of aerial photographs of the refinery site and Soda Lake. The photograph of the refinery reveals numerous petroleum storage tanks and stained areas in proximately to a major waterway, the North Platte River. The photograph of Soda Lake shows a body of water that may be a major attraction for

wildlife. Its potential for impacting the environment is evident.

A further examination of the Administrative Record reveals photographs of oil stained trenches adjacent to the North Platte River - Documents #2 and #3. Document #12, A Draft RFA, includes data from laboratory analysis showing soil and water contamination at the refinery site, observations made during inspections, photographs and information from facility records for both the former refinery and Soda Lake area. I have reviewed the 73 documents contained in the Administrative Record. All 73 documents provide relevant information which supports the Agency's determination.

B. <u>THERE HAS BEEN A RELEASE...INTO THE ENVIRONMENT</u>.

There is more than sufficient information in the Administrative Record that there has been a release into the environment. The Agency believes that, given the broad remedial purpose of Section 3008(h), the term release should encompass at least as much as the definition of release under CERCLA. See 42 U.S.C. §9601(22). Therefore a release is any spilling, leaking, pumping, pouring, emitting, emptying, discharging, escaping, leaching, dumping or disposing into the environment.

The Agency gives the term "environment" a broad interpretation. The legislative history for Section 3008(h), which discusses use of this authority to respond to releases to various environmental media, makes it clear that Section 3008(h) is not limited to a particular medium. H. Rep. No. 1133, 98th Cong., 2d Sess. 111-112 (1984). As noted above in Section A, and

below in Section C, the Administrative Record repeatedly documents releases into the environment. A specific example is a spill of sulfuric acid, which occurred on July 23, 1990 (Document 22).

Also, Amoco admits that approximately 10 million gallons of petroleum product has been recovered from the water table under the refinery since 1981. Amoco is still recovering product from the water table. In its Post Hearing Brief at 30 EPA argues that "[a]lthough Amoco refers to the liquid in question as `product,' it is clear that this material is `solid waste' Amoco oil Company was a party to a case decided in 1993 where the court held that `leaking petroleum product constitutes `disposal' of `solid waste' .... " Paper Recycling. Inc. v Amoco Oil Company, 856 F.Supp. 671 (N.D. Ga. 1993). I therefore find there has been a release into the environment.

C. OF HAZARDOUS WASTE.

The Agency believes that the language of Section 3008(h) refers to "hazardous waste" rather that "hazardous waste identified or listed under Subtitle C", and that the omission of a reference to wastes listed or identified at 40 CFR Part 261 was deliberate, in that Congress did not intend to limit Section 3008(h) only to materials meeting the regulatory definition of hazardous waste. Porter Memo at 6.

The Conference Report specifically endorses the use of corrective action orders to respond to releases of hazardous constituents. H. Rep. No. 1133, 98th Cong., 2d Sess 111 (1984).

The legislative history also indicates that the 3008(h) authority should be at least as broad as the corrective action authority in the federal RCRA permit program. Id. at 111-112. The regulations address both hazardous waste and hazardous constituents. Moreover, Section 3004(u), the `Continuing Releases' provision requiring clean-up of releases from any solid waste management unit at a treatment, storage or disposal facility seeking a RCRA permit, applies to releases of hazardous constituents as well as releases of listed and characteristic wastes. H. Rep. No. 198, 98th Cong., 1st Sess. 60 (1983). On the above basis, I find that Section 3008(h) applies to both hazardous wastes and hazardous constituents.

The Administrative Record EPA relied on in developing the Order identified numerous releases of hazardous waste at the Facility.[3] Some documented releases are episodic spills of listed hazardous wastes such as sulfuric acid (D002) and toluene (F005). Others are releases of various hazardous constituents in a number of places, including the inlet basin to Soda Lake.[4]

Amoco admits in its preliminary response to the Order that over ten million (10,000,000) gallons of petroleum product have been recovered since 1981, with a substantial decrease in measurable thickness of product on the water table.[5] This corroborates information in the Record on which EPA relied in

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[3]Hearing Transcript, pp. 27-36.

[4]EPA's Post Hearing Brief, at 30.

[5]Amoco's Preliminary Response, at 17.

developing the Order.

D. FROM A FACILITY...

Soda Lake and the Soda Lake Caustic Pit are located approximately 3 miles northeast of the operational portion of the former refinery and are only connected to it by a wastewater pipeline. Amoco objects to the inclusion of any references to Soda Lake, the Soda Lake Caustic Pit, and the pipeline in the definition of Facility because, in its opinion, Soda Lake is not contiguous to the operations portions of the Facility. Amoco's Prehearing Brief. p.5.

On the other hand, EPA argues that Soda Lake, the Soda Lake Caustic Pit, and the pipeline are contiguous to the former refinery. In support of its argument EPA cites decisions of the Environmental Appeals Board (the "EAB") and the Administrator in, respectively, In re: Exxon Company, U.S.A., 1995 Lexis 8 (EAB, 1995) ("Exxon"); and In the Matter of: Navajo Refining Company, RCRA Appeal No. 88-3, Slip Op. (EPA Administrator, June 27, 1989), EAD Vol. 2, (4.85 - 10/89), 835 ("Navajo Refining").

In Exxon the Board found two adjacent parcels of land separated by a railroad track to be contiguous. One factor in the Board's decision was that the two parcels of land were physically connected, for the purposes of solid waste management, by sewer pipes owned by Exxon.

In Navajo Refining the Administrator found that three evaporation ponds located 3 miles from the main portion of the refinery, connected to the refinery by a ditch, to be

"contiguous". The Administrator's decision was based on Navajo's control of the ditch.

Similarly, EPA argues, although Soda Lake is located three miles from the operations portion of the refinery, the two areas are connected by a pipeline, which Amoco clearly controls. Since Amoco controls, if not owns, the operations portion, the pipeline, and the Soda Lake area, they are all within the definition of Facility for purposes of the Order. EPA's Post Hearing Brief, p.37. I find the refinery is contiguous to the pipeline, and the pipeline is contiguous to Soda Lake. Therefore, I find that the former operations portion of the refinery, the pipeline and the Soda Lake area are all within the definition of "Facility" for the purposes of RCRA 3008(h).

E. AUTHORIZED TO OPERATE UNDER SECTION 3005(e)

Amoco argues that since the only unit to achieve interim status at the Facility had been certified closed by EPA before the Order was issued, the facility was no longer authorized to operate under interim status at the time the Order was issued.[6]

A review of §3005(e) of RCRA reveals that Amoco is mistaken in its view. Section 3005(e) provides:

> "...(e) INTERIM STATUS. - (1) any person who - (A) owns or operates a facility required to have a permit under this section which facility - (i) was in existence on November 19, 1980, ... (B) has complied with the requirements of section 3010(a) and (C) has made an application for a permit under this section shall be treated as having been issued such permit until such time as final

[6]Amoco's Preliminary Response, pp. 24, 34.

> administrative disposition of such application is made, ...

The fact that the only unit to achieve interim status is certified closed, does not relieve the Facility of interim status for the purposes of corrective action. This will only occur when there is a final administrative action disposing of this matter, under Section 3005(e). Since there has been no final administrative action, under RCRA, Section 3005(e), I find that Amoco is still subject to a Section 3008(h) corrective action Order at its former refinery.

V. SCOPE AND STANDARD OF REVIEW

Under the regulations governing these proceedings,[7] the Presiding Officer will evaluate the entire administrative record, and on the basis of that review and the representations of EPA and respondent at the hearing, prepare and file a recommended decision with the Regional Administrator. The recommended decision must address all material issues of fact or law properly raised by the respondent. The recommended decision must provide an explanation with citation for any decision to modify a term of the order. The recommended decision shall be based on the administrative record. Any contested relief provision in the order that is not supported by a preponderance of the evidence in the record shall be modified and issued in terms that are supported by the record or withdrawn. 40 CFR §24.12(b).

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[7] **PART 24 - RULES GOVERNING ISSUANCE OF AND ADMINISTRATIVE HEARINGS ON INTERIM STATUS CORRECTIVE ACTION ORDERS, 40 CFR PART 24.**

VI. OBJECTIONS RAISED BY RESPONDENT

The governing regulation states that the response to the initial order shall specify each factual or legal determination or relief provision in the initial order the respondent disputes, and shall briefly indicate the basis upon which it disputes such determination or provision. 40 CFR §24.05(c). In its Preliminary Response to Initial Administrative Order and Request for Hearing ("Response"), Amoco objected to nearly 230 provisions in the Order, whether substantive or procedural, thereby placing them in issue. All material issues of fact or law properly raised by the respondent must be addressed in the recommended decision. 40 CFR §24.12(b). I find Amoco's response which generally objects to everY provision of the Order dilatory, in that it does nothing to narrow the issues and requires the Presiding Officer to sift through a morass to find those issues that are material and relevant to the matter at hand. Notwithstanding, below I have addressed those material issues of fact or law raised by the respondent that I consider relevant to the issue at hand. Those objections not addressed were not considered material issues of fact or law properly raised by the respondent.

A. JURISDICTIONAL ISSUES

1. The Requirement under 40 CFR §24.10 that a hearing shall be within thirty (30) days does not Bind the Presiding Officer.

On May 19, 1995, Amoco filed a Motion to Dismiss. In its Motion to Dismiss, Amoco argues that EPA's regulations require

the Presiding Officer to schedule and hold the hearing within thirty (30) days of the Agency's receipt of the request for a public hearing,[8] and no authority exists to postpone the hearing. The EPA filed a responsive brief to Amoco's motion to dismiss on July 24, 1995.[9] Although there is no explicit authority in the regulations for motions, I am including both motions in the extended Administrative Record of this proceeding. Just as it is my opinion that it is within my discretion to include these motions in the Administrative Record, it is also my opinion that I have the discretion to postpone the hearing in this matter beyond thirty (30) days, as explained below.

The regulation is silent as to whether the Presiding Officer can unilaterally extend the date for the hearing beyond thirty (30) days; however, the regulation does state that the Presiding Officer may grant an extension of time for the conduct of the hearing upon written request of either party, for good cause shown, and after considering the prejudice to other parties.[10] /10/ Further, the regulation states that questions arising at any stage of the proceeding, which are not addressed in these rules, shall be resolved at the discretion of the ... Presiding Officer, as appropriate.[11]

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[8] 40 CFR §24.10(a).

[9] Response of the United States Environmental Protection Agency, Region VIII to the Motion of Amoco Oil Company to to Dismiss Proceedings. July 24, 1995.

[10] 40 CFR §24.10(c)

[11] 40 CFR §24.01(d)

Based on the record in this proceeding, including the Hearing under 40 CFR §24.11 held on May 31, 1995, I find that Amoco was not prejudiced by the delay of the hearing. I further find that the regulation gives the Presiding Officer discretion to extend the date of the hearing beyond thirty (30) days, when it does not prejudice the parties. Amoco's Motion to Dismiss for Lack of Jurisdiction is denied.

2. <u>The Order and its Conditions do not exceed the Statutory and Regulatory Authority of EPA and WDEQ</u>.

Amoco objects to the nature and scope of the Order, which it alleges exceeds the statutory authority granted to EPA by the United States Congress in the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984, ("RCRA"), 42 U.S.C. §6901, et seq.

Further, it is alleged that there is no statutory or regulatory authority for WDEQ's participation in the order. Also, that WDEQ's participation in the Order is contrary to EPA's regulation ... which states the Order must be "executed by an authorized official of EPA ..." 40 CFR §24.02.

It would seem to be advantageous for Amoco to have WDEQ joined in the Order. Notwithstanding, I find that the Initial Administrative Order was executed by an authorized official of EPA, the Director of the Hazardous Waste Management Division, who was sequentially delegated this authority from the Administrator, through the Regional Administrator. Since an authorized official of EPA executed the Order, I find that the Order is legally enforceable by EPA.

I further find that WDEQ has independent authority to require corrective action at facilities which are also subject to regulation under RCRA. W.S. 35-11-503(a)(v) and 35-11-701(c). Further, section 3009 of RCRA shows that Congress contemplates that States may regulate waste activities under their own law without, or prior to, authorization by EPA. 42 U.S.C. §6929.[12]

By issuing a joint Order with WDEQ, it was EPA's intention was to avoid subjecting Amoco to duplicative Orders. Since, Amoco objects to the inclusion of WDEQ in the subject Order, I direct the Agency to modify the Order to sever WDEQ, notwithstanding that this may subject Amoco to two Orders. The Agency may then reissue a unilateral Order to Amoco.

B. CONSTITUTIONAL ISSUES

1. EPA's Reliance on its Policies/Guidance does not deny Amoco Due Process

Amoco argues that the Order and its conditions deprive Amoco of its right to due process of law, under the Fifth Amendment to the U.S. Constitution.[13] More specifically, Amoco argues the Order requires compliance with and seeks to bind Amoco with respect to procedures and requirements that have never been proposed or promulgated in accordance with the APA, but rather were unilaterally pronounced by EPA in various guidance documents.[14]

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[12]Post Hearing Brief of the U.S. EPA, II p.16

[13]Amoco's Response, paragraph 63 at 21.

[14]Amoco's Response, paragraph 64 at 21-22.

The procedures and requirements that Amoco refers to are interpretive rules and statements of policy. Under the Administrative procedure Act (APA), 5 U.S.C. §500 et seq., proposed substantive rulemaking must be published in the Federal Register and be subject to public notice and comment. Interpretive rules and statements of policy, however, do not need to be published for notice and comment, as they merely express "the agency's view of what another rule, regulation, or statute means." APA, §553(d)(2), Allied Van Lines Inc. v. I.C.C.. 708 F.2d 297.300 (7th Cir. 1983), U.S. v. Zimmer Paper Products. Inc., 30 ERC 2089. 2095 (S.D. Indiana 1989).

Guidance is developed to inform, not only the regulated community, but also EPA staff of what EPA policy is under a given statute or regulation. It is not binding in the sense of creating new rights or duties, but merely explains the Agency's interpretation of the statute or regulation.[15]

2. The Requirement in the Order that Amoco Perform Additional Work under Specific Circumstances does not Violate Amoco's Due Process Rights

Amoco objects to the definition of "Additional Work" to the extent it implies that any activities not expressly described in the Order with reasonable specificity can be required by the Agency at some future time. Amoco further alleges that any requirement that "Additional Work" be performed by Amoco violates

[15]In re: Solvay Animal Health Inc., EPA Docket No. VII-90-H-0001 (Final Decision of the Regional Administrator, Region VII, April 22, 1991) ("Solvay").

Amoco's due process rights.[16]

A similar challenge was made to an Initial Order under Section 3008(h) of RCRA in a Region VII case involving Solvay Animal Health, Inc. In the Matter of Solvay Animal Health, Inc., Docket No. VII-90-H-0001 (Final Decision of the Regional Administrator, Region VII, April 22, 1991) ("Solvay"). Solvay argued the Order violated it's due process rights because the only opportunity for a hearing takes place before any unspecified additional work requests would be made and therefore there is no opportunity for meaningful review of such requests. Id. at 28.

In evaluating a procedural due process claim, the decisionmaker must consider the private interest affected, the risk of erroneous deprivation (and the probable value of additional procedural safeguards) and the Government's interest, including "the function involved and the fiscal and administrative burdens that the additional...procedural requirements would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The essence of due process is that the person in jeopardy of serious loss be given notice of the case against him and a meaningful opportunity to present his case. Id., at 348-49, citing Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72, (Frankfurter, J., concurring)(1951) and Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

In Solvay the Regional Administrator stated:

[t]he initial Order is not self-enforceable, and if an

[16]Amoco's Preliminary Response, para. 83 at 27.

> impasse is reached, whether on the issue of additional work or on compliance issues, the Agency would be required to institute an action to enforce the Order that would provide Respondent with an opportunity to be heard. Due process considerations to not require a hearing at every step in an administrative process.

Id, at 29

In its Post Hearing Brief the Agency argues, relying on Solvay:

> " [t]he basis for this decision was that the order implicitly required that any additional work "must be reasonably related to [the] stated purpose of the Order." Id., at 27. "If not reasonably related to the purpose of the Order, another Order must be issued to compel compliance from the Respondent. Id.[17]
> The Agency further argues that [i]n the Order..."the term additional work is defined as work not expressly covered, but determined to be necessary to fulfill the purposes of the Order. Section III.A.2. The purposes of the Order are set out in section IV. The means by which EPA can impose additional work under this Order are set forth in Section VII.J.1 and 2 of the Order. Only new information or changed circumstances can result in additional work requirements being imposed; and, unless the circumstances require an immediate response, Amoco has the opportunity to confer. Section VII.J.2. Finally, it should be noted that the Order sets out when EPA can require immediate action as well. Section VII.C.
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> Although the opportunity to confer is not the same as a hearing, the discussion of due process requirements set forth in Mathews, shows that due process concerns are adequately addressed by the opportunity ... to confer.

EPA's Post Hearing Brief, at 25 -26

In Solvay the Regional Administrator also held "[t]he fact that Respondent does not have the opportunity for a hearing on each action taken by the Agency...does not violate the statutory requirement for reasonable specificity." Solvay, at 28.

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[17]The Regional Administrator also noted that "[i]t cannot be presumed that the Agency will make unreasonable requests, or act in bad faith." Id.

I adopt the above argument of the Agency and find that the requirements of the Order do not compromise Amoco's due process rights.

3. Use of Agency attorney as the Presiding Officer does not deny Amoco Due Process.

In paragraph 66 of its Response, Amoco argues the appointment of an EPA attorney as the Presiding Officer for the public hearing fails to ensure the impartiality essential to a fair hearing and is inconsistent with the implicit mandate in the statute for a full and impartial adjudicatory hearing.

Amoco was advised that the undersigned is not an "attorney,, for the Agency and is not involved in any investigations or enforcement actions for the Agency.

This issue was addressed by the Court in Chemical Waste Management Inc. v. EPA, No. 88-1490, slip op. (D.C. Cir. May 5, 1989) ("Chemical Waste"). That decision cited Withrow v. Larkin, 421 U.S. 35 (1975). Withrow held that in order for a complainant to challenge a proceeding on the grounds that the Proceeding Officer is biased, they must, "overcome the presumption of honesty and integrity in those serving as adjudicators' by demonstrating "a risk of actual bias or prejudgment." Id. at 47. Amoco has not shown any actual risk of bias in these proceedings.

The Environmental Appeals Board (EAB), In Re: General Electric, No. 91-7, slip. op., (EAB, April 13, 1993); Environmental Administrative Decisions ("EAD"), Vol. 4 (3/92-12/93) 615, noted that "[i]t is axiomatic that due process

requires an impartial decisionmaker. But it is also well established that, in a due process hearing at an administrative hearing, the decisionmaker need not be independent from the agency to serve as an impartial decisionmaker. "Id., at 634.

4. Part 24 Rules are not Unconstitutional

In paragraph 65 of its Response, Amoco alleges that the Part 24 Rules are unconstitutional, in that they deny a full adjudicatory hearing.

In adopting the informal hearing procedures in Part 24, EPA specifically considered and rejected comments that the hearings should be conducted under Part 22 rather than Part 24, and that the Presiding Officer should be an Administrative Law Judge. 53 Fed. Reg. 12256 at 12257 (Comment 1) and 12259 (Comment 10) (April 13, 1988).

In addition Part 24 withstood a Constitutional challenge in 1989. Chemical Waste Management Inc. v. EPA, No. 88-1490, slip op. (D.C. Cir. May 5, 1989) ("Chemical Waste"). Chemical Waste made two arguments regarding Part 24: (1) that Part 24 is inconsistent with the intent of Congress; and (2) that Part 24 denies recipients of interim status corrective action orders due process of law. In support of (1) Chemical Waste argued:

> first, that the language of subsection (b), as interpreted by EPA in its implementing regulations requires formal procedures in all subsection (h) adjudications; second, that the legislative history of the 1984 Amendments demonstrates Congress's intention that EPA use the same formal procedures for the issuance of the new subsection (h) orders as the agency had theretofore established for the issuance of subsection (a) orders; and, third, that precedent in this circuit erects a presumption that when Congress

> refers to an adjudication as a "hearing," it intends that formal procedures be used."

Id. at 1480.

EPA, however, had already addressed these issues in the preamble to the subject regulations, as noted above.

The court applied a "Chevron[18] /18/" analysis to the argument of Chemical Waste in light of the explanations given by EPA in the Part 24 preambles, and concluded "that the Agency has provided a reasonable explanation for its choice of informal procedures in Part 24..." Id. at 1483.

The court then applied the test set forth in Mathews v. Eldridge, to Chemical Waste's argument that the procedures denied them due process in violation of the Fifth Amendment, and held that "the Part 24 regulations are not inconsistent on their face with the requirements of due process." Chemical Waste, at 1485.

C. THE ORDER IS NECESSARY TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT.

Amoco repeatedly alleges that the Order is unreasonable, and unnecessary to protect human health or the environment pursuant to the statute.[19] 42 U.S.C. §6928(h). Further, Amoco argues the Order must be withdrawn because EPA's Administrative Record does not establish that the Order and each of its conditions is `necessary to protect human health or the environment' as

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[18]Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[19]Amoco's response to the Initial Administrative Order, para B.3 and 4, pp. 3-4.

required by RCRA Section 3008(h)(1)[20]

Amoco misstates the statutory provision. Section 3008(h)(1) clearly states ... "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 focus of this provision is on the order as a whole, not each and every provision (emphasis mine). Further, the basis of information (the Administrative Record), does not need to show an actual threat to human health and the environment a potential threat is sufficient. If the Administrator had to wait for an actual threat, he would not be able to protect human health or the environment. This is clearly not what Congress intended.

D. THE ORDER STATES WITH REASONABLE SPECIFICITY THE NATURE OF THE REQUIRED CORRECTIVE ACTION

Amoco alleges that the Order must be withdrawn because it does not state with "reasonable specificity the nature of the required corrective action or other response measures" as required by RCRA Section 3008(h)(2).[21] /21/ Amoco also repeatedly argues that this lack of specificity denies Amoco due process. The due process issue is discussed above - VI.B.2.

The Regional Administrator in Solvay also discussed "reasonable specificity" in the context of 3008(h):

> The Statute's use of the term "reasonable specificity" recognized the competing interests involved -- the need for notice of the scope of the work being required on the part of the regulated entity on one hand, and the

[20]Amoco's Response, paragraph 7, at 5.

[21]Amoco's Response, Paragraph 6 at 4.

> need for flexibility in dealing with implementation of the corrective action program on the part of the Agency on the other.

Solvay, at 28.

Upon review of the Order, I find that its provisions are "reasonably specific, in that, they clearly inform Amoco as to what is required. Further, the Agency has indicated that it will be flexible in interpreting the Order.[22]

E. HAZARDOUS WASTE AS REFERRED TO IN 3008(h) INCLUDES HAZARDOUS CONSTITUENTS.

In paragraph B.16, p.7 of its Response, Amoco objects to any implication in the Order that EPA is authorized under RCRA Section 3008(h) to require formal investigations and studies ... for releases of "hazardous constituents," or releases of petroleum products or any constituents of such products. In paragraph 89, p.28 of its Response, Amoco again argues that EPA does not have authority under RCRA Section 3008(h) to address releases of hazardous constituents, further referencing paragraphs 16, 17 and 87 of its Response. Amoco further argues that EPA's authority under Section 3008(h) is clearly limited to issuing Orders only for releases of hazardous waste. The Respondent alleges that EPA is not authorized under RCRA Section 3008(h) to order corrective action for releases of "hazardous constituents," or for releases of petroleum products or any constituents of such products. And that, EPA's authority under Section 3008(h) is clearly limited to issuing Orders only for

[22]EPA's Post Hearing Brief, at 54-56.

releases of hazardous waste.[23]

The EPA Region VII Regional Administrator, considering the same issue, in Solvay cited the decision in United States v. Clow Water Systems, 701 F.Supp. 1345, 1356 (S.D. Ohio, 1988). In that case the court held that the term "hazardous waste" as used in §3008(h) includes "hazardous constituents" The Court found that the legislative history of the 1984 enactment of §3008(h) indicated the Congressional intent that the scope of the types of releases addressed by §3008(h), for interim status facilities, was to be co-extensive with that of §3004(u) regarding permitted facilities. Consequently, releases of hazardous constituents were intended to be included in the scope of §3008(h) as they are under 3004(u). I therefore find that EPA's authority under 3008(h) is co-extensive with 3004(u) has it pertains to "hazardous constituents" Also see the discussion above in IV.C.

F. EPA IS NOT AUTHORIZED UNDER RCRA SECTION 3008(h) TO REQUIRE INVESTIGATIONS AND STUDIES FOR SWMU'S, or AOC.

Respondent argues that "EPA is not authorized under RCRA Section 3008(h) to require investigations and studies described in the Order for alleged Solid waste managements units ("SWMU") or areas of concern ("AOC").[24] /24/ In EPA's Post Hearing Brief, at 60, EPA responds that ... "EPA believes that the objectives of the Order can be met without the use of the terms SWMU and AOC"... because EPA feels it is irrelevant for Section 3008(h)

[23]Amoco's Response, paragraph 16 at 7.

[24]id. Paragraphs 11,12, 13, 14 and 15, at 6 and 7.

order purposes whether areas identified for investigation are called SWMUs, AOCs, or any other term." Further, EPA argues that Section 3008(h) authorizes EPA to impose corrective action requirements on the entire Facility.[25],[26],[27] In the Matter of Liquid Chemical Corporation, EPA Docket no. RCRA-09-88-004, July 7, 1989, the Presiding Officer stated that all parts of an interim status facility, even parts not containing wastes, are subject to corrective action. I find the Section 3008(h) order is applicable to the entire Facility, and terms SWMUs and AOCs can be deleted from the Order without impairing its effectiveness.

G. THE ORDER IS SUPPORTED BY THE ADMINISTRATIVE RECORD AND IS NOT OTHERWISE PROCEDURALLY DEFECTIVE

Amoco argues that the Administrative Record is outdated, incomplete, and inaccurate, as evidenced by the inclusion of the Draft RFA, which fails to meet the requirements for the issuance of an Order as specified in 40 CFR §24.03(b).

40 CFR §24.03(b) states:

> (b) On or before the date the initial order is served on respondent the EPA office issuing the order shall deliver to the Clerk (a copy of) the administrative

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[25] 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 page 8.

[26] 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).

[27] In the Matter of Solvay Animal Health. Inc., EPA Docket No. VII-90-H-0001 (Recommended Decision, February 26, 1991).

> record supporting the findings of fact, determinations of law, and relief sought in the initial administrative order. The record shall include all relevant documents and oral information ... which the Agency considered in the process of developing and issuing the order ....

In developing the Order, the Agency relied on the Administrative Record, as a whole, as the basis for the order, not on the RFA alone. The RFA is only 1 of 73 documents in the Administrative Record. Since the EPA did not rely solely on the RFA, it did not have to be finalized.[28] /28/ Further, it does not matter if none of the documents in the Administrative Record are "finalized". All that matters is that the record contains all relevant documents, and oral information, which the Agency relied on in developing and issuing the order. 40 CFR §24.03(b).

H. THE INFORMATION THAT EPA RELIED ON IN FORMULATING THE ORDER WAS NOT CURRENT.

Amoco argues that the information that EPA relied on in formulating the Order was not current. In support of this argument Amoco offers data it collected. More specifically Amoco cites the "Summary of Existing Condition Report" (the "SECR"), dated December 16, 1994.[29] The EPA Order was filed November 18, 1994. The Agency could not have relied on the information contained in the SECR in developing the Order, since this information was not available until after the Order was issued. The information EPA relied on is in the Administrative Re cord. This is all that is required. The work subsequently performed by

[28]EPA's Post Hearing Brief at 50.

[29]Amoco's Preliminary Response, Exhibit #2

Amoco may partially fulfill the requirements the EPA Order, but cannot be the basis of the Order.

I. THE REFINERY, THE WASTEWATER PIPELINE, SODA LAKE AND THE CAUSTIC PIT ARE CONTIGUOUS, AND ARE THEREFORE, PART OF THE FACILITY.

In paragraphs 36, 37, and 38 Amoco alleges the Soda Lake cannot be considered part of the same facility as the Former Refinery since it is not "contiguous" to the Former Refinery.

This issue was discussed above in IV.E. It was found that the former refinery, the wastewater pipeline, Soda Lake and the Caustic Pit are contiguous and a part of the same Facility.

J. AMOCO'S OBJECTIONS TO SECTION V OF THE ORDER - FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. In paragraph 108 of its Response, Amoco objected to WDEQ joining EPA in issuing the Order. For the reasons stated above In VI.A.2., I found that EPA should issue a unilateral Order to Amoco. The introductory paragraph of this section of the Order shall be modified to reflect this finding.

2. The introductory paragraph under this section of the Order shall also be modified to show that there is only one Administrative Record.

3. Paragraph B of the Order shall be modified to indicate that the refinery is not operating, and that the approximate area occuppied by the refinery is 455 acres.

4 Paragraph G of the Order shall be modified to show that there are presently no active hazardous waste management units at the Former Refinery.

5. Paragraph K of the Order shall be deleted and the remaining paragraphs re-numbered accordingly.

6. Paragraph L of the Order shall be modified to delete the second sentence.

7. Paragraphs M-N of the Order shall be modified to indicate that the drum storage area was the only hazardous waste management unit identified at the refinery.

8. Paragraph P of the Order shall be modified to indicate that there was at least one hazardous waste management unit at the Facility on or before November 19, 1980.

9. Paragraph R, of the Order shall be modified to delete "authorized to operate under section 3005(e) of RCRA, 42 U.S.C. § 6925(e)"

10. Paragraph T, of the Order shall be modified to insert "Draft" before RCRA Facility Assessment ("RFA"), below, and elsewhere where it appears in the Order.

11. Paragraph U shall be deleted from the Order.

12. Paragraph Z shall be modified to delete reference to "the Wyoming Department of Environmental Quality" from the Order.

K. OBJECTIONS TO SECTIONS VII - XXV OF THE ORDER.

Amoco objections to the subject provisions of the Order are reiterative Of those previously addressed by this recommended decision. For example: Paragraph 131 not reasonably specific; 132 EPA's authority limited to releases of hazardous wastes; 133 WDEQ involvement and violates due process; 134 - hazardous constituents, again; 135 - reasonably specific; 136 - hazardous

constituents and reasonably specific. These sections are specifically listed below:

VII.	**WORK TO BE PERFORMED**
VIII.	**QUALITY ASSURANCE**
IX.	**PUBLIC COMMENT**
X.	**REPORTING**
XI.	**ON-SITE AND OFF-SITE ACCESS**
XII.	**SAMPLING AND DATA/DOCUMENT AVAILABILITY**
XIII.	**RECORD PRESERVATION**
XIV.	**PROJECT MANAGERS**
XV.	**NOTIFICATION AND DOCUMENT CERTIFICATION**
XVI.	**RESERVATION OF RIGHTS**
XVII.	**OTHER CLAIMS AND PARTIES**
XVIII.	**OTHER APPLICABLE LAWS**
XIX.	**INFEMNIFICATION OF THE GOVERNMENTS.**
XX.	**SUBSEQUENT MODIFICATION**
XXI.	**TERMINATION AND SATISFACTION**
XXII.	**SURVIVABILITY/PERMIT INTEGRATION**
XXII.	**ATTACHMENTS.**

Based on the entire Administrative Record, I have considered all the material issues of law and fact which the above provisions raise and find they have been previously addressed by this decision. Those issues of law and fact not addressed are not considered material to this matter.

IX. CONCLUSIONS OF LAW

A. Respondent is the owner of a facility that has released hazardous waste or constituents into the environment.

B. The Agency has demonstrated by a preponderance of the evidence in the record that the relief measures provided by the Order are necessary to protect human health or the environment.

C. With the modifications set forth in this Recommended Decision, the Agency has stated the required action with reasonable specificity and specified compliance deadlines.

VII. RECOMMENDED MODIFICATIONS TO THE ORDER

Pursuant to my review of the entire administrative record in

this proceeding I recommend the Initial Order be modified as follows:

1. The Order shall be modified and issued final as an unilateral order to Amoco, by EPA.

2. References to areas of the Facility EPA is concerned with as SWMU's and AOC's shall be deleted from the Order, without narrowing the scope of the Order.

3. The modifications set forth in VI.J. above are incorporated herein by reference.

Dated: February 21, 1996

/s/
Alfred C. Smith
Presiding Officer