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

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

RECOMMENDED DECISION

This Recommended Decision is part of an Environmental Protection Agency (EPA) administrative proceeding under Section 3008(h) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(h). This section of RCRA authorizes EPA to issue administrative orders requiring corrective action or other response actions deemed necessary to protect human health or the environment whenever EPA determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e) of RCRA, relating to interim status permits for the treatment, storage and disposal of hazardous wastes. Under Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), if the person named in such an order requests a hearing in a timely fashion, EPA must conduct a public hearing promptly before the order may become effective. EPA regulations codified at 40 C.F.R. Part 24 govern procedural aspects of the

proceeding.

1. APPEARANCES

Petitioner's Representatives:	Judith R. Hykel Senior Assistant Regional Counsel
	Beth A.M. Termini Senior Assistant Regional Counsel
	Joel W. Hennessy Geologist
	Betty Ann Quinn Toxicologist
	Zelma Maldonado RCRA Enforcement Officer
	Estena A. McGhee Environmental Scientist
	David M. Friedman Chemist
	Virginia M. Cody Senior Paralegal Specialist
Respondent's Representatives:	Kenneth Komoroski, Esq. Kirkpatrick & Lockhart
	John W. Stratman, Esq. Associate General Counsel Wheeling Pittsburgh Steel Corporation
	William R. Samples Director, Environmental Control Wheeling Pittsburgh Steel Corporation
	STEPHEN B. ELLINGSON, Ph.D. Geraghty & Miller, Inc.

Mark E. Wagner, Associate
Senior Project Advisor
Geraghty & Miller
(By written statement)

2. REGULATORY BACKGROUND

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

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

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

> (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment...

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

All orders issued under RCRA § 3008 are subject to the public hearing provision of RCRA § 3008(b), 42 U.S.C. § 6928(b):

> Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing...

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

3. PROCEDURAL BACKGROUND

This proceeding was initiated on September 27, 1996, when the Associate Director, Office of RCRA Programs, Hazardous Waste Management Division, United States Environmental Protection

Agency, Region III (Petitioner) issued the Initial Administrative Order (IAO). The IAO could not become enforceable until Respondent Wheeling Pittsburgh Steel Corporation (WPSC) had an opportunity to respond to it and to be heard by a neutral Agency Official in accordance with 40 C.F.R. Part 24. The IAO directed WPSC to undertake a RCRA Facility Investigation (RFI) and a Corrective Measures Study (CMS) at Respondent's Follansbee, West Virginia coke plant. The IAO also required Respondent to develop and implement certain Interim Measures (IM). Otherwise, the IAO did not require Respondent to undertake corrective measures.

Respondent filed a timely request for hearing, but did not file a timely Response to the IAO, as required by 40 C.F.R. § 24.05. The parties were engaged in active litigation in Federal Court over the IAO, and the parties jointly requested a series of extension orders in this proceeding, which the Presiding Officer granted. Petitioner also agreed to amend the IAO to restate its purpose, and did so on November 14, 1996. Respondent filed a second request for hearing, based on the issuance of the amended IAO, on December 12, 1996. Again, Respondent did not file a Response, and again, the parties requested a series of extension orders, which the Presiding Officer granted. The litigation in the District Court concluded on April 24, 1997, with a decision and opinion in favor of EPA. WPSC appealed to the Circuit Court of Appeals for

the Fourth Circuit.

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

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

The hearing was held in this matter on September 17, 1997, in EPA's Regional Office in the 841 Chestnut Building,

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

Philadelphia, Pennsylvania. The hearing commenced at 10:00 AM and was concluded at approximately 5:00 PM. All of the hearing participants, in particular Dr. Samples of WPSC, Dr. Ellingson of Geraghty & Miller, Mr. Hennessey and Ms. Quinn of EPA, were most helpful to the Presiding Officer in understanding the issues presented by the case. Because Respondent claimed that an unavailable person with very relevant information (Mark Wagner of WPSC's environmental consultant, Geraghty & Miller) should also be heard, the Presiding Officer decided to allow that person to submit additional undeveloped factual and technical matters before closing the record of the proceeding.

The Presiding Officer signed and issued a Summary of the hearing on September 23, 1997, as required by 40 C.F.R. § 24.12(a), and authorized the parties to make post-hearing submissions as contemplated by 40 C.F.R. § 24.11. The Fourth Circuit upheld the District Court's decision and issued its own opinion on November 10, 1997. All post-hearing submissions were submitted as directed by the Presiding Officer. All post-hearing submissions were submitted as directed by the Presiding Officer; the final submissions were filed on November 17, 1997.

4. WPSC's FOLLANSBEE COKING PLANT

WPSC owns and operates the Follansbee Coking Plant, located

on the East bank of the Ohio River (River mile 68.8-69.5)[2] in the northern panhandle of West Virginia.[3] WPSC has three steel plants in the immediate vicinity of the Follansbee Coking Plant: the Steubenville Plant and the Mingo Junction Plant on the West bank of the Ohio, and Wheeling Nisshin, south of Follansbee on the East bank.

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

The Facility uses a Byproduct recovery process, referred to as the AKJ process[7] to produce metallurgical coke. The Follansbee

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[2]AR000342

[3]AR000197

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

[5]TR43;TR111;TR190;TR233

[6]AR000197; 000343

[7]TR83

coking process also produces other useful byproducts for sale or reuse in the recovery process.

Coke is produced by feeding large quantities of coal into huge ovens or batteries at high temperature in the absence of air. This process also produces a series of gases and liquids. The gases are cooled, and tar condenses. Tar and liquid from the cooled gases are collected in a decanter and refined to collect various saleable products. The remaining tar ("coal tar") is transported by pipeline to the adjacent Koppers Industries facility for additional refinement.[8] At the Follansbee Plant, sludge from the decanting process(decanter tank tar sludge) is returned to the coking process.[9] This recycling of the decanter tank tar sludge is the AKJ process.

The primary coking operation at the Follansbee Facility is conducted in a series of coke batteries, numbered 1 through 8, laid out end to end, more or less parallel to the Ohio River. A WPSC Byproducts plant is located to the East of Battery Number 1. Two significant sampling wells, RW-1 and RW-2, are located near Batteries 1 and 2. Closer to the River, and in part adjacent to the Koppers Industries plant, lies the North Coal Pit, and to its South, the South Coal Pit. Under a berm between the North Coal

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[8]AR000343; TR97-98

[9]TR98-99.

Pit and the South Coal Pit there is a pipeline that carries coal tar from the WPSC Follansbee Facility to Koppers Industries for refining. South of the South Coal Pit is the Coke Storage South Coal Pit. Further South is the former decanter tank tar sludge impoundment area.[10] The Follansbee Facility has an on-site wastewater treatment plant, pretreatment facilities for discharge into Publicly Owned Treatment Works and National Pollutant Discharge Elimination System permits WV0004499 and WV0023281.[11] All of the foregoing physical features of the Follansbee Facility are clearly depicted on Exhibit P-1.

5. Relevant Regulatory Chronology

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

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

[11]AR000201, AR000342.

[12]AR00001-000003.

[13]AR000014.

sludge for off-site disposal before the effective date of the RCRA regulations.[14]

On August 8, 1991, EPA acknowledged Respondent's Interim Status under RCRA § 3005(e).[15] EPA listed the name and location of the Facility as, "Wheeling-Pittsburgh Steel Corporation, Route 2, Follansbee, WV 26037."[16] On October 13, 1981, Respondent informed EPA of its plans to discontinue use of the decanter tank tar sludge surface impoundment and forwarded company plans for doing so.[17] Respondent later submitted additional U.S. EPA Notification of Hazardous Waste Activity forms on February 12, 1988,[18] on January 26, 1990,[19] and on January 21, 1991.[20]

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

> "First, and at the outset, let me state that Wheeling Pittsburgh Steel at the Follansbee Plant has never engaged in the treatment,

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[14]TR63

[15]AR000015-16

[16]AR000017

[17]AR000018-40

[18]AR000119-122

[19]AR000144-147

[20]AR000221-223

storage or disposal of hazardous waste.

Wheeling Pittsburgh Steel has never owned or operated a treatment, storage or disposal facility at that location."[21]

Counsel evidently either ignored or forgot that WPSC declared in RCRA Permit Application Part A that the Follansbee Facility "[d]oes or will..treat, store or dispose of hazardous wastes,[22] that the impoundment was adjudicated an interim status facility in an EPA administrative enforcement proceeding,[23] that WPSC itself agreed that the decanter tank tar sludge surface impoundment was a RCRA interim status facility which WPSC "used to treat, store and/or dispose of the hazardous waste KO87,"[24] and that WPSC subsequently acted as if the entire Follansbee Facility was a RCRA Interim Status Facility.[25]

In its Post-hearing Reply Brief WPSC makes reference to a class of "protective filers," described by EPA as those facilities that submitted a Part A application, but never

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[21]TR62

[22]AR000007

[23]See next section;AR000114-118

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

[25]Regulatory History, pp. 9-11 above

conducted a regulated activity requiring a permit.[26] WPSC alludes to a 1986 EPA statement that "protective filers" are not subject to EPA's corrective action authorities.[27] WPSC does not claim to be such a "protective filer," and, given the regulatory history recited above, the relevance of WPSC's references to "protective filers" to the issue of RCRA § 3008(h) jurisdiction over the Follansbee Facility is tangential at best.

6. RELEVANT ENFORCEMENT HISTORY

A. Previous EPA/WPSC Litigation

In 1982, EPA filed an administrative enforcement action against Respondent under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), seeking to compel proper closure of the decanter tar sludge surface impoundment and the assessment of a $20,000 penalty. EPA alleged that the impoundment was an interim status facility.[28] The dispute in that case had to do with the adequacy of Respondent's excavation of the impoundment as "closure;" EPA demanded soil sampling to assure proper cleanup and closure. After a full hearing, the Administrative Law Judge ruled in EPA's favor, assessing a $17,500 penalty and ordering Respondent either to prove the adequacy of its cleanup or follow EPA closure

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[26] 50 Fed. Reg. 38946, 38948 (September 25, 1985)(emphasis added)

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

[28] AR000042

rules.[29] EPA's Chief Judicial Officer affirmed on appeal.[30] WPSC filed suit in the Federal District Court to enjoin enforcement of the EPA order in 1985; EPA counterclaimed to have the order enforced. After four years of negotiations, the parties finalized a Consent Decree.[31] In settling the case, WPSC conceded that it had used the decanter tar sludge surface impoundment to treat, store and/or dispose of hazardous waste K087-decanter tank tar sludge from coking operations, and that the impoundment was an interim status facility,[32] but did not concede that the entire Follansbee Facility was an interim status facility.

The Consent Decree contains a dispute resolution clause[33] that Respondent invoked when Petitioner issued the IAO, since the IAO purported to apply to the whole Follansbee Plant. Thus, the matter was recently brought back to the Federal District Court on the jurisdictional issue of whether EPA may use RCRA § 3008(h) to require WPSC to perform the RFI, IM and CMS for the entire Follansbee Facility, even though the only interim status facility involved in EPA's original administrative penalty action and in

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[29]AR000048-69

[30]AR000114-118

[31]AR000123-143

[32]Consent Decree § IV; AR000125

[33]AR000136

the Consent Decree was the decanter tank tar sludge surface impoundment. The Federal District Court ruled on April 24, 1997, that EPA does have such jurisdiction, by virtue of the "jurisdictional hook" of the decanter tank tar sludge impoundment (which was conceded to be an interim status facility in the 1989 Consent Decree),[34] and by virtue of the express reservations of EPA rights that the parties included in the Decree. ("The United States reserves its corrective action authority under 42 U.S.C. §§ 6924(u) and (v) and 42 U.S.C. § 6928(h)...") [emphasized reference is to RCRA § 3008(h)]. Respondent appealed this decision to the Fourth Circuit Court of Appeals, which affirmed the District Court's decision in an unpublished opinion dated November 10, 1997. In that opinion, the Fourth Circuit stated that the District Court's observations about the propriety of the amended IAO..." were unnecessary to the disposition of the case, and that they should not be regarded as *res judicata*, collateral estoppel, or the law of the case-either in the pending administrative proceedings, or in any further judicial proceedings that may be necessary."[35]

B. Federal and State Inspections

The Administrative Record contains a number of State and

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[34]AR000125

[35]Opinion, p. 7, fn 2.

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

On January 2, 1990, a West Virginia Department of Natural Resources Inspector followed up on an earlier inspection during which WVDNR discovered decanter tank tar sludge being buried on site instead of being returned to the coke oven.[36] The record also contains a reference to a report, supposedly prepared for WPSC, that some 40 tons of decanter tank tar sludge were buried on the Follansbee grounds, but not at the decanter tank tar sludge surface impoundment, sometime in 1987 or 1988.[37]

On June 11, 1991, three WVDNR Inspectors found seven violations of the State's Hazardous Waste Management Act, including several relating to tar sludge management.[38] The inspectors discovered KO87 on the soil near the decanter tar sludge boxes and KO87 drippings from the coke oven gas line.

On July 30 and August 19, 1992, a joint EPA-WVDEP inspection team found two violations of State and Federal regulations, neither directly related to decanter tank tar sludge

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[36]AR000151

[37]AR000214

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

management.[39] Wheeling-Pittsburgh's Director of Environmental Control responded to all areas of concern, and to the violations, by letter dated September 17, 1992.[40] One of the WVDEP Inspectors reviewed Mr. Samples' letter and found it lacking; this review led to the finding of three additional violations.[41]

WVDEP issued a Notice of Violation based on a June 16, 1993 joint EPA-WVDEP inspection. The company was cited for the lack of an adequate Contingency Plan.[42]

7. Disputed Issues

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

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[39]AR000240

[40]AR000282

[41]AR000329

[42]AR000523

Officer shall recommend that the order be modified and issued on terms that are supported by the record or withdrawn. This Recommended Decision recommends modification of the IAO, as discussed below.

Respondent "properly raised" a number of issues of fact and law in its Response by specifying the disputed factual or legal determinations, or relief provisions in the IAO, with a brief indication of the bases upon which it disputed them. 40 C.F.R. § 24.05(c). After a general discussion of the central issues, this Recommended Decision will address the remaining material issues. The key issues are:

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

B. Whether the administrative record supports a finding that a release or threatened release of hazardous waste into the environment has occurred or might occur at the Follansbee Facility;

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

8. ANALYSIS

A. EPA Jurisdiction: On the issue of jurisdiction, the judgement of the District Court, having been affirmed by the Court of Appeals, should be the final word in the administrative

litigation on this issue. The District Court ruled, and the Court of Appeals affirmed this part of the District Court's Memorandum Opinion and Order, that ,"[j]urisdiction for the IAO and the Amended IAO is predicated on Section 3008(h) of RCRA, 42 U.S.C. §6928(h)."[43] The Court quoted language of the consent decree addressing EPA's RCRA § 3008(h) authority:" The United States reserves its corrective action authority under 42 U.S.C. §§ 6924(u) and(v) and 42 U.S.C. § 6928(h) and its authorities under CERCLA."[44] This is not the issue that the Fourth Circuit so clearly warned against taking as *res judicata* or collateral estoppel.[45] On the basis of the plain language of the Consent Decree, one might assume that the parties were in agreement in 1989, that EPA had RCRA § 3008(h) [as well as RCRA §§ 3004(u) and(v) and CERCLA] jurisdiction over the Follansbee Facility, since the Consent Decree was only the mechanism for addressing releases of hazardous wastes from the decanter tank tar sludge surface impoundment. Respondent, however, asserts in its Response to the IAO that RCRA § 3008(h) authority is precluded by the Consent Decree. Respondent characterizes the Consent Decree as an

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[43]Memorandum of Opinion and Order, Civil Action No. 5:85-CV-124 (N.D. WV) (April 24, 1997), submitted as Exhibit B in Respondent's Pre-Hearing Submission.

[44]Consent Decree, Civil Action No. 85-0124-W (N.D.WV) (October 8, 1989), Section XVII; AR000139.

[45]See footnote 34 and related text, page 15 above.

agreement to disagree. Brief of Respondent WPSC, p.5. This crabbed reading of a simple Consent Decree, like Respondent's counsels' opening remarks at the hearing,[46] demonstrates a refusal to acknowledge things for what they are. Respondent apparently believes that because the parties in the Consent Decree agreed that the decanter tank tar sludge surface impoundment was an interim status facility, the rest of the Follansbee Facility could not be an interim status facility.[47] Respondent's argument intentionally misses the distinction between the concept of a "regulatory facility" and the concept of a "corrective action facility" under RCRA.

As explained by Petitioner,[48] EPA uses the term "facility" in a "regulatory"[49] context in determining the discrete areas or units located on property utilized for hazardous waste management that need a RCRA permit or to obtain interim status:"...all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing

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[46]See p. 11, above

[47]WPSC's prehearing submission, p.2. "The surface impoundment is the only 'interim status facility' at the Follansbee Plant."

[48]Petitioner's Post-hearing Brief, p. 16.

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

of hazardous waste." 40 C.F.R. § 260.10 [Definition of the term "facility," (1)]. Facilities implementing corrective action consist of "...all contiguous property under control of the owner or operator seeking a permit..." 40 C.F.R. § 260.10 [Definition of the term "facility,"(2)]. The entire "corrective action facility" is not necessarily used for the treatment, storage or disposal of hazardous wastes, but it may include areas, though not so used, which may be affected by the treatment, storage or especially disposal of hazardous wastes in a "regulatory facility" or any other release of hazardous waste on the property. For that reason, where property owned or controlled by the owner or operator of a "regulatory" interim status facility located on that property has had or may have a release of a hazardous waste contaminate it, the property is a "corrective action facility," and comes under EPA's RCRA § 3008(h) jurisdiction. This is not new Agency policy, nor is it a novel application of existing law. The "corrective action facility" definition dates back at least to a Federal Register notice in July of 1985.[50] It was spelled out succinctly in EPA's December 15, 1985 Interpretation of Section 3008(h) of the Solid Waste Disposal Act. "For interim status corrective action purposes, EPA intends to employ the definition of 'facility' adopted by the

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

Agency in the corrective action program for releases from permitted facilities...Therefore the definition of facility encompasses all contiguous property under the owner or operator's control." Interpretation of Section 3008(h), p. 7. In 1987 the Court of Appeals for the District of Columbia, dealing with the use of the word "facility" in RCRA wrote: "Clearly, 'facility' is used in section 3009(v) to describe all of the property under the control of the owner or the operator." United Technologies Corp. V U.S. Environmental Protection Agency, 821 F. 2d 714, 722. In 1989, the same court wrote: "If the expert agency believes that the legislative purpose will best be satisfied by construing the term to mean different things in different contexts, then it may act upon that premise. This court has previously upheld the agency's decision to employ different definitions of the term "facility" in construing different portions of the RCRA." The court cites the United Technologies Corp. case. Mobil Oil Corp. V EPA, 871 F. 2d 149, 153. In 1990, the Seventh Circuit Court of Appeals relied on the United Technologies Corp. decision to help find its way through the "Statutory Cloud Cuckoo Land" of RCRA. Inland Steel Co. v EPA, 901 F. 2d 1419, 1421. A significant body of EPA administrative precedent also supports the definition of "corrective action facility."[51]

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

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

Even in the absence of the District Court's determination, on this record the Presiding Officer would still sustain the Petitioner's assertion of RCRA § 3008(h) authority over the entire Follansbee Facility. Most of the reasons for his view come from the actions of the Respondent. First, Respondent submitted a series of RCRA notifications not limited to the decanter tank tar sludge impoundment,[52] received notice of interim status from EPA,[53] and never acted formally to withdraw from that regulatory arena. Counsel's dramatic declarations, quoted above, notwithstanding, the Follansbee Facility clearly qualified for interim status, and continued to submit RCRA Notification forms for several years. Further, courts that have considered the

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

[53]AR000015

issue have concluded that once a facility has qualified for interim status, the facility remains within the reach of RCRA § 3008(h), even if interim status is lost.[54] Otherwise, a contaminated facility might not be subject to RCRA corrective action requirements if the owner or operator of such a facility chose to lose interim status intentionally, or never to seek interim status at all.

Second, the statement at hearing of William R. Samples, Respondent's Director of Environmental Controls,[55] described a lengthy history of an old coke making complex, that only recently has begun to correct drips and spills and leaks of "product" with the potential to contaminate the soil, the groundwater and the Ohio River (in diminishing concentrations). The exact age of the Facility is not in the record, but it is evident that decades of contamination have occurred at Follansbee. The observations of State and Federal officials during inspections of the Follansbee

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

[55] TR229-230

Facility bolster the impression of an historically contaminated operation.[56]

WPSC would have the Presiding Officer follow it through an extensive and informative analysis of the legislative history of RCRA in an effort to demonstrate that EPA has no RCRA § 3008(h) authority over the Follansbee Facility.[57] The Presiding Officer expressly declined to take this legislative history tour, since he saw no ambiguity in the statutory language. "Section 3008(a) is plain and unambiguous on its face, however, and it is therefore unnecessary to look to a committee report to interpret its meaning. See e.g. Blum v Stenson, 465 U.S. 886, 896 (1984); TVA v Hill, 437 U.S. 153, 184 n.29 (1978).[58] An unambiguous statutory provision that does not have limiting language cannot be construed as containing a restriction.[59] "No resort to legislative history is made, in the absence of extraordinary circumstances, where there is no ambiguity or uncertainty as to

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

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

[58] In the Matter of CID-Chemical Waste Management of Illinois, Inc., RCRA(3008) Appeal No. 87-11 (August 18, 1988).

[59] Barnes v Cohen, 749 F. 2d 1009, 1013 (3rd Cir. 1985).

meaning.[60]"

B. Release of a Hazardous Waste: RCRA does not define the term "release," so the Presiding Officer used EPA's definition, set forth in its Interpretation of Section 3008(h): "...a release is any spilling, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." (pp.4-5). The definition makes no reference to "units," contrary to WPSC's argument that RCRA § 3008(h) authority is limited to releases from units.[61]

According to a report by Remcor, Inc., prepared for WPSC on the removal of buried sludge at the site, sometime between November 1987 and March 1998 approximately 40 tons of decanter tank tar sludge were buried at two locations at the site.[62]

In his January 9, 1990 report of an inspection he conducted one week earlier at the WPSC Follansbee Facility, West Virginia Waste Management Inspector James Fenske wrote:"...an investigation by the Waste Management Section revealed some K087 was being buried on-site instead of being returned to the original process."[63] This "original process" appears to be WPSC's

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[60] In re Wheland Foundry, RCRA-IV-89-25-R (September 30, 1993.

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

[62] AR000214

[63] AR000151

AKJ process, which was instituted in the late 1980's.[64] According to West Virginia Waste Management Section Inspector James Gaston's November 19, 1991 report of his June 11, 1991 inspection, there was "soil contaminated with KO87" at the Follansbee Facility.[65] There is no response from WPSC in the Administrative Record to the January 9, 1990 report of KO87 being buried on-site. Although WPSC disputed the November 19, 1991 allegation that there was soil contaminated with KO87 at the Follansbee Facility in its Response to the IAO,[66] no evidence to counter that serious aspect of the inspector's report was introduced into the record by WPSC. WPSC's Director of Environmental Control, William Samples, did respond to the November 19, 1991 report that described soil contaminated with KO87, but Dr. Samples comments were addressed to other portions of the inspection report.[67]

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

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[64]TR000159

[65]TR000226

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

[67]AR000237-239

August 20, 1992.[68]

Pamela S. Lyons inspected the Follansbee Facility on June 16, 1993, and in her July 15, 1993 report she described her observations of a box labelled "Hazardous Waste," which Facility representatives told her contained coal tar[69] removed from a roadway near the decanters. There is no response in the record to either of these latter two reports of KO87 spills at the Follansbee Facility.

Benzene contamination of the soil and groundwater has also been documented. WPSC notified EPA that it was generating hazardous waste DO18 (benzene) on January 22, 1991.[70] Soil and groundwater samples taken on December 22, 1992 contained elevated levels of benzene.[71] WPSC made no attempt to counter these findings at any stage of this proceeding.

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[68]AR000247

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

[70]AR000222

[71]AR000362; AR000410-411

The Presiding Officer inferred from WPSC's unresponsiveness to these reports of spills of KO87, which constituted releases of a hazardous waste, that these events did in fact occur. If anything, WPSC confirmed a history of "drips and spills and leaks" through a statement of Dr. Samples at the hearing.[72]

These drips, leaks and spills, if not promptly cleaned up, cause soil contamination in a short period of time, and, over a longer period, groundwater contamination. Eventually groundwater contamination can cause contamination of nearby bodies of surface water, assuming "normal" groundwater flow. There is no direct evidence in the record of groundwater or surface water contamination by KO87 itself, only by many of its constituents, and there is some hearsay evidence in the record of soil contaminated by KO87. There is circumstantial evidence that WPSC buried KO87 on-site,[73] and there is substantial evidence of soil and groundwater contamination by constituents[74] of KO87, at least in some areas of the Facility, specifically, the Byproducts plant. WVDEP inspection of "recovery" wells placed in this area (designated RW-1 and RW-2 on Petitioner's Exhibit 3) revealed oil and water being pumped from the aquifer into an oil-water

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[72]TR229-231.

[73]AR000151;AR000214

[74]The hazardous constituents are listed in Table I of the IAO.

separator. Drilling logs from wells placed in the area just to the East of the North Coal Pit (designated R-210 and R-310 on Petitioner's Exhibit 3) demonstrate soil contamination, and samples drawn from these wells show clearly an oily layer of liquid containing constituents of hazardous waste. Contamination of the groundwater by hazardous constituents is grounds to order corrective action.[75] Detection of hazardous constituents in groundwater demonstrates the release of hazardous waste requiring corrective action.[76]

WPSC's environmental consultant, Geraghty & Miller, in an effort to "conceptualize the risk" posed by the contamination at the Follansbee Facility, conducted soil borings and installed monitoring wells in certain areas of the Facility, and also conducted some groundwater sampling along the Ohio River perimeter of the Facility. In its June 9, 1997 Response to the IAO, WPSC objected to Petitioner's use of the "perimeter study" on the grounds that it was offered for settlement, citing Rule 408 of the Federal Rules of Evidence, which generally precludes the use of material obtained in settlement discussions at trial, unless they have been also obtained by independent means. This

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[75] United States of America v Clow Water Systems, 701 F. Supp. 1345, 1353-1355 (D.D.C.,December 19,1988)

[76] United States v Environmental Waste Control,710 F. Supp. 1172, 1227 (N.D.Ind. 1989);United States v Hardage,761 F. Supp. 1501, 1510 (W.D. Okla. 1990)

rule prohibits the admission into evidence settlement-related materials, conduct and statements. The is no provision analogous to Rule 408 in 40 C.F.R. Part 24, but even if the Rules of Evidence do not bind the Presiding Officer, they may certainly provide reliable guidance. The public's interest in promoting compromise and settlement of disputes would be undermined if parties were allowed to use settlement-related material as evidence, because allowing that use would chill the willingness of negotiators to make offers and otherwise explore settlement possibilities. This objection of WPSC is well founded, and the Presiding Officer has disregarded the "perimeter study" itself and all statements pertaining to it.

A more extreme reaction would be to strike the study and related comments from the record altogether. However, the Presiding Officer decided to allow the material to remain in the record and to make the following observations regarding "the perimeter study" to indicate how he would weigh it were it not excluded from consideration: The parties refer to the Ohio River, to the alluvial aquifer and the perched aquifers as if they were unrelated water systems. The Presiding Officer saw them all as parts of a single hydrologic regime, even though the perched zones are not in full contact with the rest of the regime at this time. The evidence shows that they have all been contaminated to some degree, with contamination levels apparently diminishing

into the Ohio. In short, the "perimeter study" merely demonstrates that the contamination gets diluted as it migrates from the source(s) on the Follansbee Facility (on the Koppers Industries Facility, too) to the Ohio.

Geraghty & Miller's other studies confirmed the presence of "coal tar product" and "dissolved coal tar and constituents" in groundwater under the Follansbee Facility.[77] Although the western portion of the Facility adjacent to the Koppers Facility appears to have been contaminated by releases that occurred at the Koppers Facility and by hazardous constituents migrating beneath the WPSC Facility,[78] contamination in the Byproducts area in the northern part of the Follansbee Facility was caused by releases of WPSC hazardous wastes in the forms of "drips, spill and leaks" and burial of KO87 on the Follansbee grounds. The Administrative Record clearly supports a finding that there have been releases of hazardous wastes at the Follansbee Facility and that there is a significant threat of further releases.

C. Response Actions (RFI, IM and CMS) are Necessary to Protect Human Life or the Environment: Since this proceeding involves a

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[77]Wagner's "Undeveloped Testimony", p.3. The Presiding Officer assumed Mr. Wagner's reference to be to coal tar and not to decanter tank tar sludge (KO87). See p.27, footnote 68, above.

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

RCRA Facility Investigation, Interim Measures (already being implemented by Respondent) and a Corrective Measures Study but no actual corrective actions, Petitioner must demonstrate by a preponderance of the evidence that a general threat, rather than an actual threat, to human health or to the environment exists at the WPSC Follansbee Facility.[79]

The parties focussed on protection of human health both in their document filings and in their statements at the hearing. Perhaps it was assumed by Petitioner and implicitly conceded by Respondent that operations at WPSC's Follansbee Facility over the years has harmed the environment; in any event, this record clearly supports a finding that past operations there have indeed harmed the environment. The 1992 samples from the North and South Interceptor wells indicated a floating phase hydrocarbon had been released in the Byproducts area of the Facility.[80] There was benzene at concentrations over the toxicity characteristic limit set forth at 40 C.F.R. 261.24. Respondent reported the generation of hazardous waste exhibiting the toxicity characteristic for

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

[80]AR000408-413; AR000362

benzene (D018) in a Notification of Hazardous Waste Activity in 1991.[81] Other hazardous constituents of decanter tank tar sludge, including toluene, benzo(a)pyrene and napthalene[82] were also detected in the groundwater at significant concentrations.[83]

Past practices involving the management of the decanter tank tar sludge (K087 when not being recycled) appear to have contaminated the soil and groundwater.[84] Boring logs and observations confirm migration of oily materials through the soil to the confining layer of rock, at least in one area.[85] Benzo(a)pyrene was detected in the bedrock layer aquifer.[86] Several other hazardous constituents were detected in the alluvial aquifer.[87] Since the 1980's, WPSC's use of the AKJ

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[81]AR000222

[82]40 C.F.R. Part VII -Basis for listing hazardous waste K087 includes napthalene; 40 C.F.R Part 261, Appendix VIII-list of hazardous constituents; 40 C.F.R. Part 264, Appendix IX-Groundwater monitoring list.

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

[84]TR106

[85]TR233, TR234

[86]AR001431;AR001453

[87]AR001431;AR001453

system to recycle the K087 back into the coking process has probably reduced the level of ongoing environmental harm, but the history of inspections recited above indicates that environmental harm continues. As counsel for WPSC observed:"...if the decanter tank tar sludge is discarded, and discard includes placing it on the ground, it continues to be a hazardous waste as it was before 1991 when the exclusion came out."[88]

There is inadequate information available to identify all of the sources of contamination[89] at WPSC's Follansbee Facility and that information must be developed before decisions can be made about whether corrective action should be commenced, and if so, what specific corrective actions should be taken. Action may have to be taken to protect the environment from those aspects of the coking operations and related K087 management operations that constitute a threat of future additional harm to the environment.

The environmental harm poses the potential of harm to human health. Low levels of ammonia and phenol were detected in the Hooverson Heights water supply wells in 1986 and 1987, according to Paragraph J of the IAO. WPSC's Response disputes this, but the company offered no proof to rebut the support for

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[88]TR153; The exclusion for recycled K087 was published at 57 Fed. Reg. 27880 (June 22, 1992)

[89]TR105, TR106, TR248, TR249

this finding contained in the administrative record.[90] WPSC did not dispute Paragraph T of the IAO, reciting elevated levels of benzene and toluene in the water supply of the City of Wheeling, West Virginia, one day after a spill occurred (and was reported) at the Follansbee Facility. Petitioner provided an expert's statement regarding "potential exposure" to contaminated soil.[91] This statement was also unrebutted.

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

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

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[90]AR000215-216

[91]TR222

with EPA's assertion of authority.[92] The RFI may indicate the need for corrective action; it is also possible that no corrective action will be deemed necessary to protect human life or the environment.

9. SPECIFIC PROVISIONS OF THE INITIAL ADMINISTRATIVE ORDER

WPSC's Response to the IAO was not a "blanket" challenge to all of the findings, conclusions and directives of the IAO. Instead, WPSC carefully designated as contested provisions only those provisions that WPSC believed to be erroneous, unreasonable, illegal or any combination of the foregoing. Consistent with the Presiding Officer's duty to address all material issues of fact or law properly raised by the Respondent, 40 C.F.R. § 24.17, this section will address those objections raised in the Response that have not been addressed above. Paragraph numbers and headings correspond to both the IAO and to WPSC's Response.

IV. FINDINGS OF FACT

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

[92]TR171

in the Administrative Record, an August 15, 1980 Notification of Hazardous Waste Activity signed by R.C. McLean, WPSC Vice President-Operations, clearly shows that Respondent identified itself as a generator of hazardous waste and an owner/operator of a hazardous waste treatment, storage, and/or disposal facility for the following hazardous wastes: FO16 (this waste was "delisted" on November 12, 1980[93]);KO87; D002(corrosive); and D003(reactive). Respondent offered no evidence to the contrary in support of its position disputing this finding.

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

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

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[93]45 Fed. Reg. 74888

Petitioner included columns labelled "MCL," "TLCP,[94]" and "RBC.[95]" WPSC disputed the statement that "MCLs reflect health factors and the technical and economic feasibility of recovering ccontaminants from the water supply." WPSC also disputed the MCL values listed in TABLE I.

The term "maximum contaminant level" means the maximum permissable level of a contaminant in water which is delivered to any user of a public water system. This term comes from the Safe Drinking Water Act's provisions on public water supplies.[96] The Presiding Officer was unable to find any support in the Administrative Record for Petitioner's assertion that "MCLs reflect...the technical and economic feasibility of recovering contaminants from a water supply." At the hearing, the MCLs listed for Benz(a)anthracene, Chrysene, Benzo(b)fluoranthlene and Benzo(k)fluoranthlene in TABLE I were designated as proposed, and specific values were assigned to them.[97] The statement defining MCLs must be corrected; Table 1 should be modified to reflect the

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

[95]Risk-based concentration.

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

[97]TR39-41

corrections noted at hearing.

S. This IAO finding contains a statement that wells R-210 and R-310 on the WPSC Facility are downgradient from the WPSC coal pits. WPSC disputes that statement. Exhibit R-1 shows the locations of wells R-210 and R-310 and the WPSC coal pits. The coal pits and the Koppers Industries facility lie between the wells and the Ohio River. It appears that the wells are upgradient of the coal pits and the Koppers facility. Petitioner's geologist, Joel Hennessy, stated:"Well R-210 and R-310...is (sic) over 400 feet from the boundary of the Koppers Industries facility...an incredibly substantial flow reversal for flow from the Koppers facility...to migrate all the way back to Well R-210 and R-310."[98] This statement supports Respondent's assertion that wells R210 and R-310 are upgradient from the coal pits.

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

Sample analyses showed concentrations of benzene,

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[98]TR191-192

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

V. In this IAO finding, Petitioner alleges that WPSC's consultant told EPA representatives on May 14, 1996 that wells R-1 and R-2 were installed in 1995 "for the purpose of recovering hydrocarbons from the groundwater." WPSC's Response disputes the quoted portion of this finding. There is in the record a June 23, 1995 WPSC letter to WVDEP that refers to "recovery wells" and includes a recovery well schematic.[99] The Presiding Officer found no supporting evidence in the record for this finding as set forth in the IAO, so Petitioner has failed to meet its burden of proof with regard to it. WPSC also disputes the wording of this finding with regard to the location of well RW-2, but a fair reading of both the finding and WPSC's Response to it indicates to the Presiding Officer that the parties in fact agree that well RW-2 is not located at the site of former interceptor well RW-North, although well RW-1 was installed at or near the location

[99]AR001239-40

of former interceptor well RW-South.

W. This IAO finding describes the Geraghty & Miller "Perimeter Study" that the Presiding Officer has excluded from consideration at Respondent's request. It contains TABLE III, indicating levels of contaminants detected in samples during the study and it compares those levels to MCLs. WPSC disputes that the contaminants listed in TABLE III are constituents of concern, disputed the inclusion of one of the contaminants (beryllium) in the TABLE, and made assertions based upon the "Perimeter Study." This finding contains no allegation that the contaminants listed in TABLE III are constituents of concern. At WPSC's request, the Presiding Officer excluded consideration of the "Perimeter Study" from his deliberations.[100] WPSC offered no explanation for its disputing the inclusion of beryllium in Table III; beryllium is an inorganic contaminant with an MCL promulgated at 40 C.F.R. § 141.23.

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

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[100] See pages 28-29, above.

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

AA(2). This IAO finding states that the Ohio River is a high quality stream and a warm water fishery used for recreational purposes. WPSC disputes that the Ohio is a high quality stream in fact or by designation. Respondent offered no evidence in support of its disputing the finding that the Ohio River is a high quality stream and warm water fishery used for recreational purposes. In 1986, River uses included navigation, water supply, recreation, fishing, swimming, assimilation of wastewaters and power plant cooling.[101] Nothing in the record indicated any official "designation" of the River as a high quality stream, and Petitioner did not recite any such designation in the finding.

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

[101]AR100501

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

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

conceded that the Hooverson Heights source was the Ohio River.[102] The parties appear to agree that the city of Follansbee draws its water from wells subject to influence by the Ohio.[103] Petitioner's representative Elizabeth A. Quinn stated that surficial runoff could carry potentially contaminated soil into the river.[104] There is no record support for the proposition that contaminated groundwater might migrate from the Facility to the Follansbee and Hooverson Heights water supplies directly, but it is possible that groundwater flow into the Ohio might reach the cities' intakes.

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

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[102]TR20; TR59; TR213

[103]TR58; TR59; TR213

[104]TR210-211

V. CONCLUSIONS OF LAW AND DETERMINATIONS

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

VI. WORK TO BE PERFORMED

General Objections

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

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

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

contamination in accordance with this order.

A. Interim Measures("IM")

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

2. This Paragraph of the IAO would require WPSC to submit a Description of Current Conditions to EPA. EPA would then review the submission and other information to determine whether to direct WPSC to perform more Interim Measures. WPSC would have 10 days from receipt of EPA's directive(s) to submit an IM Workplan for EPA approval. WPSC's objection to the 10-day turnaround period for the company to prepare an IM Workplan that may require more than one Interim Measure is well taken. The Presiding Officer finds that an initial 20-day turnaround period for the first Interim Measure required under this Paragraph, and an additional 10 day period for each additional Interim Measure ordered by Petitioner, to be a fair way in which to acknowledge WPSC's recent strike and its effects and to provide Petitioner an

incentive to keep the number and costs of Interim Measures to the minimum necessary to accomplish the goals of this action.

3. This Paragraph of the IAO would require WPSC to report releases of hazardous wastes or hazardous constituents not already addressed by the Corrective Action Order, and, within 10 days of receipt of a directive from EPA, to submit an IM Workplan to address those releases. WPSC's objection to reporting newly discovered releases, regardless of quantity, is off base. While the Comprehensive Environmental Compensation and Liability Act, the Clean Air Act and the Clean Water Act impose their own respective reporting requirements applicable to the broad definition of "release,"[105] it is well within Petitioner's RCRA § 3008(h) authority to impose additional requirements, and, on the basis of any information indicating a release or a threat of a release of hazardous waste or hazardous constituent at the facility, to order corrective action, or other appropriate response measures. As indicated in the preceding paragraph, 10 days in most situations is too short a time to prepare an IM Workplan while trying to comply with a corrective action order and run a coking operation. In other situations, where time is of the essence, this requirement may take precedence over other work. Mutual reasonableness will be required of the parties to

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[105]See p.24, above.

avoid wasted time, money and effort, and harm to human health or the environment. WPSC should be given 20 days to submit a IM Workplan in this provision.

B. RCRA Facility Investigation ("RFI")

7. This Paragraph requires submission of the Description of Current Conditions within 60 days of the effective date of the order. WPSC's objection is the "standard" objection used throughout the second half of the Response:"...not supported by the record and insufficient for the reasons discussed hereinabove."[106] WPSC probably has readily available most of the information required for the Description of Current Conditions; much of it was used in the "Perimeter Study" and during the course of this proceeding, or is contained either in the Administrative Record supporting the IAO or in the materials added to the record since the IAO was issued. The 60-day timeframe for this part of the response is fair and reasonable.

8. This paragraph would require WPSC to submit a Pre-Investigation Evaluation of Corrective Measures Technologies at the same time the Description of Current Conditions is due. WPSC disputes this requirement on its "General Objection" grounds. The requirement to submit a Pre-Investigation Evaluation of

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[106]VI.A2; A3; B7; B8; B9; C14; C15; F20; F23; F24; IX.B; XII.B, XV.A-G These are references to the General Objections discussed above at p.

Corrective Measures Technologies at the same time the Description of Current Conditions is due means that WPSC and its consultant would have to work on them more or less simultaneously. The Presiding Officer drew an inference from this simultaneous requirement that EPA has prejudged the "Current Conditions" and has determined a need to commence investigating remedies. In this case, that makes no sense to the Presiding Officer. If EPA were in a hurry to get this action underway, the simultaneous preparation and submission might be more reasonable, although in the view of the Presiding Officer, the quality of both products would likely suffer. Here, Petitioner aquiesced in a delay of a year before bringing this matter to hearing. Granted, the judicial litigation might have made it awkward for EPA to address matters clearly in the court action, and there might have been limitations imposed on the administrative proceeding. In any event, the delay of a year in bringing the matter to hearing is not the only delay Petitioner could have avoided. After the hearing was "extended" to allow undeveloped matter into the record, Petitioner's key witness left the country for extended overseas travel. On his return, additional time was needed for him to review and respond to the Respondent's undeveloped matter (Mr. Wagner's submission). The Presiding Officer infers from this record that Petitioner is in no particular hurry to move this investigation forward.

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

On the other hand, the workload associated with the Pre-Investigation Evaluation of Corrective Measures Technologies is not so great as to require a 60-day timeframe. Since this report is based on "potential corrective measures known to Respondent" (emphasis mine)[107] a 30-day period is appropriate.

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

Respondent will be allowed 90 days to complete the RFI Workplan, commencing 90 days after the effective date of the

[107]IAO, Attachment B, p. 4

final order.

10. This paragraph in the IAO lays out the general content of the RFI Workplan. WPSC disputes this requirement on the grounds that the equivalent of an RFI Workplan has already been submitted to EPA. The Presiding Officer was unable to locate any such submission in the record. To the extent work product previously submitted to EPA is deemed by Petitioner to be the functional equivalent of any part of the RFI Workplan (or to fulfill any other requirement of the Order in whole or to a degree), such part need not be redone or resubmitted.[108] This concept was endorsed by Petitioner's representative at the hearing.[109]

WPSC also disputes EPA's authority to select a corrective measure(s) based upon the RFI Workplan. WPSC offers no argument or evidence in support of this proposition, so the Presiding Officer infers there is none. EPA may order corrective action on the basis of its statutory authority, and its discretion in selection of specific measures need meet only a "no abuse of discretion" test.

C. Corrective Measures Study ("CMS")

14. This paragraph requires submission of the

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

[109] TR215

Corrective Measures Study (CMS) within 60 days of receipt of EPA approval of the Final RFI Report. WPSC's objection to the requirement to submit a CMS within 60 days of EPA approval is based upon the notion that the CMS may not be necessary at all, yet the IAO makes it mandatory.[110] This issue was of concern to the Presiding Officer during the hearing as well.[111] EPA's representative, Mr. Hennessey, spoke of a "no action alternative" in a CMS.[112] But none of the EPA representatives suggested the possibility that the EPA approval of the preceding phase, the final RFI Report, might endorse a "no further action" determination. Thus, the IAO presupposes the need for, and imposes the absolute requirement for, a CMS, while Petitioner's representatives states "...we don't know the scope of what we might want to do..."[113]

The Presiding Officer found this sequence to be unreasonable, so the requirement to submit a draft CMS (an extension and refinement of work previously performed) should be made contingent upon an express determination by Petitioner in its approval of the Final FRI Report that a CMS either is

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[110]Prehearing Submission, p. 14

[111]TR244-250

[112]TR250

[113]TR248

necessary or is not necessary.

15. This paragraph requires WPSC to revise the draft CMS Report within 30 days of receipt of EPA comments and to submit a Final CMS Report. WPSC misreads this paragraph and objects to the requirement to submit a Final CMS report, revised to address all EPA comments, within thirty days of receipt of a Final RFI report. It is clear to the Presiding Officer that WPSC intended to object to the 30-day turnaround on EPA comments on the draft CMS report, not the Final RFI report. Given that EPA will have reviewed a Description of the Current Conditions, a Pre-Investigation Evaluation of Corrective Measures Technologies, an RFI Workplan and other materials, 30-day the requirement to finalize the CMS Report, incorporating EPA's comments based upon the draft, seems reasonable.

F. Submissions/EPA Approval/Additional Work.

20. The Second Amendment to the IAO obviated the need for WPSC to make IM Workplan submissions, except as required by conditions discovered during the tasks of the order under **VI. A. 3.** In those situations, 10 days is a reasonable amount of time to prepare an IM Workplan. WPSC's other submissions required by the order will be reviewed by EPA, and either approved in writing or disapproved for reasons set forth in writing. WPSC will have

30 days to revise all other deficient submissions.[114] WPSC raises only its "standard" objection to dispute this requirement. Since none of the revised submissions will be a "from scratch" effort, the 30-day time frame is reasonable.

23. This IAO paragraph imposes limitations on WPSC's hiring of professional engineers and geologists to oversee the work at the Follansbee Facility. Essentially, EPA may veto WPSC's choices. WPSC's dispute with this is the "standard" one.

If WPSC has retained a professional engineer or geologist with expertise in hazardous waste site investigation, it is reasonable to require WPSC to identify that person and to document his/her qualifications for EPA. If no one has been retained, the 10-day limit might cause WPSC to hurry the selection of a key person in the company's compliance with the order; it is therefore unreasonable and possibly counterproductive. EPA must allow a 30-day period for WPSC to select a professional engineer or geologist. In the event EPA disapproves of WPSC's selection, EPA must provide WPSC a written statement of reasons, to avoid the appearance of arbitrariness. Further, given the delay possible in EPA's review of the qualifications, the requirement imposed upon WPSC to find and hire a better replacement within 15 days is unreasonable. In

[114]IAO, pp. 17-18.

this situation, WPSC should be given thirty (30) days to replace a "vetoed" engineer/geologist. The requirement to notify EPA 10 days before voluntarily changing the engineer or geologist is reasonable.

24. This Paragraph sets up mechanisms for EPA to notify WPSC that additional work will be required, for consultation and Workplan submission. The procedures for notification, consultation, submittal and performance of additional necessary work are reasonable and fair. WPSC's dispute with "the requirement that it has the opportunity to meet or confer with EPA to discuss the additional work" is illogical and counterproductive. The rest of WPSC's "standard" dispute requires no discussion.

IX. ON-SITE AND OFF-SITE ACCESS

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

specific objections and in light of the purpose of this action.

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

XII. PROJECT COORDINATORS

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

XV. RESERVATION OF RIGHTS

A-G. In this section of the IAO, EPA lays out reservations of various rights in 5 paragraphs (A, B,D,F and G), and makes two assertions about the legal effect of the order in 2 other paragraphs(C and E). In addition to its standard objection, WPSC objects to EPA's assertion that EPA may recover its costs. There is nothing unlawful or unreasonable in EPA's reservations of its various rights. To the extent EPA may attempt to enforce any of these rights against WPSC, the company is free to raise any defenses it may have. The assertion in Paragraph C is that WPSC's compliance with the order will not excuse violation of any other law, and the assertion in Paragraph E is that the order is not a permit. These assertions are valid. As to recovery of EPA costs incurred under RCRA, the law in this Circuit is that such costs may be recoverable.[115] The entire **RESERVATION OF RIGHTS** section is valid.

10. RECOMMENDED REVISIONS TO THE IAO

On the basis of the administrative record in this proceeding, the Presiding Officer recommends that the Regional Administrator find that modification of the order is necessary and direct the signatory official on the IAO issued September 27,

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

1996, that the order be modified as follows:

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

In accordance with the same amendment, revise Section IV., Paragraph H to read: "On October 2, 1989, EPA and WPS entered into a Consent Decree to resolve outstanding issues relating to the administrative complaint filed by the EPA against WPS, WPS's subsequent administrative appeal of that complaint, and WPS's lawsuit to overturn EPA's Final Decision on the administrative appeal. In the Consent Decree, the Respondent agreed to, among other things, (1) conduct closure and post closure of the surface impoundment; (2) develop a groundwater monitoring plan to assess the scope of groundwater contamination from the surface impoundment and; in the event the groundwater monitoring data indicates that hazardous wastes and/or hazardous constituents have been released or are being released into the environment from the surface impoundment at the Follansbee facility, implement EPA-approved or ordered corrective action, necessary to

protect human health or the environment. Section VII of the Consent Decree provides that Respondent's agreement to perform this work in no way limits any other corrective action authority EPA may have. Furthermore, in Section XVII of the Consent Decree, EPA specifically reserved its corrective action authority under Section 3008(h) of RCRA, 42 U.S.C. § 6928(h)."

In accordance with the same amendment, the second paragraph of Section VI of the IAO should read: "Pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), Respondent is hereby ordered to perform the following tasks in the manner and by the dates specified herein. This Order does not require Respondent to perform Interim Measures, a RCRA Facility Investigation or a Corrective Measures Study for hazardous wastes and/or hazardous constituents which have been released or which are being released into the environment from the surface impoundment referred to in Section IV, Paragraph H, above."

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

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

"Respondent shall operate and maintain an interceptor well system to recover coal tar released from the underground pipeline, as referenced in the Wheeling-Pittsburgh Steel

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

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

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

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

Commencing within ten (10) calendar days of the effective date of this Order and continuing thereafter, Respondent shall

install, operate and maintain a recovery system in the Byproducts area of the Facility to recover floating phase hydrocarbons which were identified in Interceptor Well North and Interceptor Well South. The purpose of said recovery system shall be to remove floating phase hydrocarbons to contain, prevent further migration into the alluvial aquifer and the Ohio River of floating phase hydrocarbons and any hazardous wastes and hazardous constituents associated with the hydrocarbons. Said recovery system shall include installation of appropriately sized total fluids recovery pumps in, and piping at, recovery wells RW-1 and RW-2 at the Facility.

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

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

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

Section IV., Paragraph Q, should be modified as follows: From the first paragraph, delete,"MCLs reflect health factors and the technical and economic feasibility of recovering contaminants from the water supply." In TABLE I, designate as proposed these

MCLs for Benz(a)anthracene:.000092 *mg/l*, Chrysene:0092 *mg/l*, Benzo(b)fluoranthene:000092 *mg/l* and Benzo(k)fluoranthene: 00092 *mg/l*.

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

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

Section IV., Paragraph Z should be modified by removing the last sentence: "Coal tar (KO87) is a listed hazardous waste."

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

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

Section VI., Paragraph A.2 should be modified to replace the last two sentences with the following: "If appropriate, EPA will select one or more interim measures and notify Respondent of EPA's selection. Within twenty(20) calendar days of receipt of such notice from EPA, Respondent will submit to EPA for approval a workplan for the first listed interim measure. If EPA has

listed more than one interim measure, Respondent may take up to ten(10) additional days for each additional submission."

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

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

Section VI., Paragraph B.9., should be modified to read as follows: "Within ninety (90) days of receipt od EPA's approval of the Evaluation and an express EPA directive to proceed, Respondent shall submit to EPA a Workplan for A RCRA Facility Investigation ("RFI Workplan"). The RFI Workplan is subject to approval by EPA and shall be developed in accordance with the RFI Scope of Work contained in Attachment B, RCRA, its implementing regulations, and such relevant EPA guidance documents as EPA may provide."

Section VI., Paragraph C. 14, should be modified to read as follows: "Within sixty(60) calendar days of receipt of EPA approval of the Final RFI Report, together with a written

determination that a Corrective Measures Study ("CMS") is necessary, Respondent shall submit to EPA for approval a draft CMS Report in accordance with the CMS Scope of Work in Attachment C.

Section VI.F.23. should be modified to replace "ten (10)calendar days" with "thirty (30)calendar days" in the second sentence. Also, the fourth sentence should read:" EPA shall have the right, upon providing written reasons to Respondent, to disapprove at any time the use of any professional engineer, geologist, contractor or subcontractor selected by Respondent." Finally, the fifth sentence should be modified to replace "fifteen(15)calendar days" with "thirty(30) calendar days."

Respectfully submitted,

Date: 2/5/98

Benjamin Kalkstein
BENJAMIN KALKSTEIN
Presiding Officer