

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of)

Ashland Chemical Co., Div. of)
Ashland Oil, Inc.,)

Respondent)

Docket Nos. 9-83-RCRA-10 &
9-83-RCRA-40

Resource Conservation and Recovery Act - Totally Enclosed Treatment Facility - Incinerators - Because of potential for gaseous emissions from combustion of liquid hazardous waste to include hazardous waste or constituents thereof, incinerator was not totally enclosed within meaning of 40 CFR 260.10 and incinerator was subject to RCRA regulation.

Resource Conservation and Recovery Act - Waste Used or Re-used, Recycled or Reclaimed - Incineration.

Where evidence failed to establish that primary purpose of incinerating liquid hazardous waste, gases from which were passed through boiler to generate steam prior to discharge to atmosphere, was energy recovery rather than destruction of waste, Respondent was not entitled to exemption for hazardous waste which is beneficially used, re-used, recycled or reclaimed pursuant to 40 CFR 261.6.

Resource Conservation and Recovery Act - Incinerators - Part B of Hazardous Waste Management Facility Permit Application.

Owner and operator of incinerator, which burned liquid hazardous waste, could be compelled to submit Part B of hazardous waste management facility permit application.

Appearance for Complainant:

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Appearance for Respondent:

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Ashland Chemical Co., Division
of Ashland Oil, Inc.
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Initial Decision

This is a proceeding under § 3008 of the Solid Waste Disposal Act, as amended by the Resource, Conservation and Recovery Act (42 U.S.C. 6928).^{1/} The proceeding was commenced on May 12, 1983, by the issuance by the Director, Toxics & Waste Management Division, U.S. Environmental Protection Agency, Region IX of a Determination of Violation (DOV), Compliance Order and Notice of Right To Request a Hearing. The DOV alleged, inter alia, that Ashland Oil Company was a Kentucky Corporation which owned, operated managed and controlled a corporate division known as Ashland Chemical Company and that Ashland Chemical Company was a manufacturer of polyester and alkyd resins in a facility located at 6608 East 26th Street, Los Angeles, California.

^{1/} Section 3008(c) of the Act (42 U.S.C. 6928(c)) provides:

"(c) Requirements of Compliance Orders--Any order issued under this section may include a suspension or revocation of a permit issued under this subtitle, and shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

The DOV further alleged that Ashland filed a notification of hazardous waste activity pursuant to § 3010 of RCRA (42 U.S.C. 6930). Although not so alleged, it appears that Ashland filed Part A RCRA permit application on or about November 17, 1980, and thus qualified for interim status in accordance with § 3005 of the Act. On September 30, 1982, Respondent, in accordance with 40 CFR 122.22(a)(4), presently 40 CFR 270.10(e)(4) (1983),^{2/} was formally requested to submit Part B RCRA permit application by April 1, 1983. The DOV alleged that Ashland had not submitted the application by the required date (April 1, 1983) and, in fact, had not yet submitted said document in violation of 40 CFR 122.22(a)(4) and § 3005 of RCRA. Respondent was ordered to submit the permit application within 15 days of service of the complaint and assessed a penalty of \$2,500.

Respondent answered, admitting that it had failed to submit Part B permit application by April 1, 1983. Ashland denied, however, that said application was required by law and that it was in violation of the Act and regulations. Ashland alleged that it initially believed that liquid wastes burned in its fume incinerator were subject to RCRA regulations and filed a Part A permit application. Respondent stated that upon further review, it determined that its waste system was totally enclosed, that the Part A permit application

^{2/} The initial sentence of the cited regulation (40 CFR 270.10(e)(4)) provides that "(a)t any time after promulgation of Phase II the owner and operator of an existing HWM facility may be required to submit Part B of their permit application." The definitions at 40 CFR 270.2 indicate that Phase II means that phase of the Federal hazardous waste management program commencing on the effective date of the first Subpart of 40 CFR Part 264, Subparts F through R to be initially promulgated. Subparts F through N of 40 CFR Part 264 were issued 47 FR 32350 (July 26, 1982) and became effective January 26, 1983. Subpart O, Incinerators, was issued 46 FR 7678 (January 23, 1981) and became effective July 23, 1981.

was submitted in error and should be withdrawn and that the facility was not subject to regulation under RCRA.

On July 13, 1983, Complainant issued a Supplemental Compliance Order pursuant to § 3008 of the Act suspending any and all permits issued to Ashland or any authority to operate as if a permit had been issued under Subtitle C of RCRA until Complainant has determined that Respondent had fully complied with the Compliance Order issued on May 16, 1983.

On August 31, 1983, Complainant issued a second Determination of Violation and Notice of Right to Request a Hearing (Docket No. 9-83-RCRA-40). The DOV recited, inter alia, that Ashland had been formally requested on September 30, 1982, to submit Part B of the HWM facility permit application by April 1, 1983, that in the prior DOV and Compliance Order (Docket No. 9-83-RCRA-10), Respondent had been directed to submit Part B of the permit application by June 1, 1983, that in a Supplemental Compliance Order issued on July 13, 1983, Respondent's authority to operate had been suspended pending compliance with the Compliance Order issued on May 16, 1983, that an inspection on July 28, 1983, revealed that Respondent was still using its incinerator to dispose of hazardous wastes, and that Respondent had not submitted Part B of the permit application by June 1, 1983, or to date. It was proposed to assess Ashland a penalty of not less than \$1,000 for each day of noncompliance with the Compliance Order as supplemented on or after June 1, 1983.

Respondent answered, repeating its contention that it was not subject to RCRA regulations and denying that it had any obligation to submit Part B of the permit application. Ashland requested a hearing and moved for consoli-

dation of the two proceedings. This motion was granted and the proceedings (Docket Nos. 9-83-RCRA-10 and 9-83-RCRA-40) were consolidated by an order, dated October 7, 1983.

A hearing on this matter was held in Los Angeles, California on March 29, 1984.

Findings of Fact

Based on the entire record including the briefs and proposed findings of parties, I find that the following facts are established:

1. Ashland Chemical Co. is a division of Ashland Oil, Inc., a Kentucky Corporation.
2. Ashland or Respondent operates a facility for the manufacturer of polyester and alkyd resins at 6608 East 26th Street, Los Angeles, California.
3. On August 18, 1980, Ashland filed a Notification of Hazardous Waste Activity pursuant to § 3010 of the Act (42 U.S.C. 6930). The notification, signed by Ashland's Manufacturing Manager on August 8, 1980, indicated that listed hazardous wastes generated, treated, stored or disposed of at the facility were: U002 (acetone), U147 (maelic anhydride), U162 (methyl methacrylate), U190 (phthalic anhydride), U223 (toluene diisocyanate) and U239 (xylene).^{3/} Acetone, maelic

^{3/} Complainant's Exh 3. Inclusion of these chemicals from the lists in 40 CFR 261.33 as "listed" hazardous wastes would appear to be due to an abundance of caution, because the comment at 261.33(d) provides in part: "(w)here a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraphs (e) or (f) [wastes referred to in the text are contained in paragraph (f)], such waste will be listed in either §§ 261.31 or 261.32 or will be identified as a hazardous waste by the characteristics set forth in Subpart C of this part." In pleadings and on brief Ashland has insisted that wastes fed to the incinerator are hazardous because of being ignitable and are not listed RCRA wastes.

anhydride and phthalic anhydride are hazardous because they are toxic. Methyl methacrylate is ignitable and toxic, toluene diisocyanate is reactive and toxic and xylene is hazardous because it is ignitable. The notification also indicated that non-listed hazardous wastes handled at the facility were ignitable, corrosive, reactive and toxic.

4. On or about November 19, 1980, Ashland filed a Part A permit application (Complainant's Exh 4). This document indicated that Ashland treated (incinerated) Hazardous Waste No. D001 (ignitable) in an estimated annual quantity of 33 tons. No other hazardous wastes were referred to in the application.
5. On September 30, 1982, Complainant formally requested Ashland, among other firms, to submit Part B of its application for a hazardous waste facility permit under RCRA by April 1, 1983 (Complainant's Exh 5). Enclosed with the letter was a copy of the Federal Register (47 FR 27520, June 24, 1982), which specified information to be submitted concerning the incinerator at Respondent's facility. The letter pointed out that the anticipated authorization to the California Department of Health Services to handle RCRA permitting would not extend to incinerators for which EPA would be the permitting authority. The letter also stated that a briefing for applicants would be held in the EPA offices on November 17, 1982, and strongly urged addressees to attend for the reason that information provided would expedite preparation of the Part B application.
6. Ashland did not file a Part B permit application by April 1, 1983, and indeed, had not submitted such an application to the date of the hearing.

7. Under date of May 9, 1983, the Director of Toxics and Waste Management Division, U.S. EPA, Region IX, issued a Determination of Violation (DOV), Compliance Order and Notice of Right to Request a Hearing to Ashland. The DOV referred to the Notification of Hazardous Activity and Part A permit application filed by Respondent, recited the formal request for the Part B permit application to be submitted by April 1, 1983, and Ashland's failure to comply with that request and concluded that Respondent had violated 40 CFR 122.22(a)(4), presently 40 CFR 270.10 (e)(4), and § 3005 of the Act (42 U.S.C. 6925). In the accompanying Compliance Order, Respondent was ordered to pay a penalty of \$2,500 and to submit a Part B permit application for the facility referred to in finding 2 within 15 days from the service of the complaint.
8. Respondent answered, admitting that it had failed to submit a Part B permit application by April 1, 1983, but specifically denying that such filing was required by law and that it was in violation of RCRA regulations and the Act. Ashland alleged that it initially believed that liquid wastes burned in its fume incinerator were subject to RCRA and filed a Part A permit application. Ashland further alleged that upon further review, it determined that its waste system was totally enclosed and exempt from RCRA regulations. The answer asserted that no hazardous liquids or gases are emitted or discharged from the incinerator or any other source in the system and that the Part A permit application was submitted in error and should be withdrawn.
9. Under date of July 13, 1983, Complainant issued a Supplemental Compliance Order suspending any and all permits or Respondent's authority to

operate as if a permit had been issued under the authority of Subtitle C of RCRA until such time as Complainant had determined that Ashland had fully complied with the Compliance Order issued to Respondent on May 16, 1983.

10. On July 28, 1983, an inspection of Ashland's facility was conducted to determine if it was continuing to operate the on-site incinerator and to describe the operations of the incinerator. The report of this inspection (Complainant's Exh 6) indicates that the incinerator must be continually operating during the time that the polyester resin reactors are running and that the system runs 24 hours a day on a five-day week. Ashland's South Coast Air Quality Management District (SCAQMD) permit to operate specifies an air pollution control system consisting of a gas fired afterburner for the combustion of a liquid waste stream and specifically requires that the afterburner be operated at not less than 1400°F. Although the burner operates on natural gas, there is fuel value in the liquid and vapor waste streams. The gas and condensed organic vapor portion of the collection system is semi-automated. Valves required to feed liquid wastes (condensate) into the incinerator are, however, manually operated. The inspector was informed that phthalic anhydride was one of the chemicals used in the reactors.
11. On September 1, 1983, Complainant issued to Ashland a second DOV and Notice of Right to Request a Hearing. The DOV recited its jurisdictional basis in the Act and regulations, and referenced the formal request of September 30, 1982, that Respondent submit Part B of the hazardous waste permit application by April 1, 1983, and the prior DOV wherein

Ashland was ordered to submit the application by June 1, 1983. The DOV also referred to the Supplemental Compliance Order issued on July 13, 1983, which suspended any and all permits or any authority of Respondent to operate until such time as Complainant had determined that Respondent had fully complied with the previous Compliance Order and to the fact that an inspection on July 28, 1983, revealed that the incinerator was being operated to dispose of hazardous waste in violation of the Compliance Order. It was proposed to assess Respondent a penalty of not less than \$1,000 for each and every day of non-compliance with the Compliance Order as supplemented on and after June 1, 1983.

12. Ashland answered, specifically denying for reasons previously stated that it was subject to RCRA regulations and required to submit Part B of the RCRA permit application.
13. Mr. Harold Mork, formerly Ashland's Manufacturing Manager and presently a consultant to Ashland, described Respondent's plant (Tr. 116; Schematic, Respondent's Exh 1). He testified that the plant utilized multiple reactors and that raw materials consisted mainly of dibasic acids and polyols (polyhydric alcohol). These are reacted and the vapors passed through a packed column, the purpose of which is to return glycols and other valuable materials to the reactor. After leaving the packed column, the vapors go to a condenser where all condensible materials are collected. The vapors then pass to a tank, where they are held temporarily prior to being fed to the incinerator. This tank is held under a slightly negative pressure by a fan located adjacent to the incinerator. Mr. Mork testified that the only way the reactors were vented was through the incinerator which had to be in operation for the equipment to legally run (Tr. 117).

14. The significance of having the system under negative pressure is that there is no leakage of vapors or odors to the plant or the neighborhood. Mr. Mork stated that if there was a leak in the line, air would leak into the system. He further stated that the primary function of the incinerator is to burn organic non-condensibles and that from the incinerator the hot gases pass to the waste heat boiler, which generates steam to run the plant (Tr. 117-18). He testified that all of the equipment was stainless steel and was not subject to corrosion and leakage (Tr. 120).
15. Mr. Mork was familiar with a regulatory clarification memorandum, which had been issued on the subject of totally enclosed treatment facilities as defined in the RCRA regulations (Tr. 121). In his opinion, the Ashland facility was totally enclosed, because it was the only way they could operate without any odor problems. In further testimony, he explained that the facility was totally enclosed, because there was no exodus therefrom other than through the fume incinerator (Tr. 127). He testified that the reactor, the columns, condensers and all of the equipment were closed and that all vents in one way or another lead to the fume incinerator (Tr. 127-28).
16. It appears that the facility here involved was constructed about 1953 and that a so-called fume incinerator was installed about 1972, because of complaints of odors emanating from the plant (Tr. 111-12). In conjunction with the incinerator, a waste heat boiler was installed which utilized fumes from the production process in addition to natural gas to generate steam to operate the plant. Organic condensibles were also collected and burned in the incinerator as a substitute

for natural gas (Tr. 113). After installation of the incinerator, complaints of odor from the plant ceased (Tr. 114).

17. In 1982 modifications to the incinerator were made, primarily to enable burning of the aqueous portion of the waste stream (water of esterification) in the incinerator, which previously had been neutralized and discharged to the sewer system (Tr. 114-15). The changes also made the incinerator safer and more economical to operate. Although Mr. Mork referred to an explosion in the firebox of the incinerator, which shut the plant down, he testified that there had been no problems since the 1982 modifications (Tr. 121).
18. Ashland's SCAQMD permit to operate (Complainant's Exh 6) specifies that a temperature of not less than 1400°F must be maintained in the afterburner when the equipment is in operation and that the waste liquid feed rate to the firebox of the afterburner may not exceed two gallons per minute under gas firing or one-half gallon per minute under oil firing.
19. On cross-examination, Mr. Mork testified that Ashland had not performed any analyses to determine if the waste streams contained wastes listed in the RCRA regulations and that the only analysis performed was for hydrocarbons (Tr. 123). He further testified, however, that there were no hazardous waste emissions from the incinerator (Tr. 125). He based this testimony on a Truesdail Laboratory report (not in evidence), which reportedly reflected less than 100 parts per million (ppm) of materials in the stack gases. In further testimony, he explained that the facility (incinerator) emitted less than 100 ppm of hydrocarbons (Tr. 129).

20. Mr. John H. Hirt is President of Hirt Combustion Engineers (Tr. 130). He testified that his firm had been in the business of designing and installing incinerators since 1954 and had installed all incinerators for resin manufacturing plants in the Los Angeles Basin (Tr. 131). He pointed out that application of thermal oxidizers to resin plants was a meticulous and tricky operation and if many different parameters weren't carefully watched, the plant could blow up (Tr. 131). He stated that this business separated the "men from the boys" and estimated that on a nation-wide basis his firm had performed 70% of installations of incinerators in resin plants.
21. Mr. Hirt testified that incinerators installed by his firm continually passed 70 ppm [stack emission tests], which means that the emissions contained one molecule of carbon (Tr. 134). He explained that if hexane were in the waste stream, 10 ppm would remain after passing through the incinerator and in effect that very few chemicals were toxic at that level. He stated that although chlorinated hydrocarbons might be toxic at that level, they had not been detected in emissions from his firm's incinerators. He further indicated that there were no chlorinated hydrocarbons in the Ashland system. In response to a question as to whether complex organics might not be combusted at temperatures present in the Ashland incinerator as suggested by Ms. Cynthia Jackson, a witness for Complainant, Mr. Hirt replied that he had never found it [such non-combustion] or heard of such problems (Tr. 134-35).
22. Asked his opinion as to whether the Ashland facility as shown on the schematic (Respondent's Exh 1) was totally enclosed, Mr. Hirt responded

that if you understand a thermal oxidizer, it must have an outlet pipe (Tr. 136). He explained, however, that the incinerator had a barrier of 1400 degrees and that if the incinerator was properly designed and had passed the stack test [to show that it was properly designed], there was no way anything was going to get out of there without being properly treated (Tr. 136-37). Mr. Hirt further testified that the system was made of impermeable materials and did not pose a potential for escape of hazardous waste to the environment, because the stack had been tested and the amount [of materials] coming out of the stack was negligible (Tr. 137-38).

23. Mr. Hirt acknowledged that a flame-out of the burner was always possible (Tr. 140). He stated that the major concern in such an event was to shut off the liquid waste going to the incinerator and to stop the reaction and the fumes going into the whole system until the incinerator could be re-established. He said that the temperature in the incinerator was controlled, that liquid wastes were not fed into the system until a certain temperature was reached and described the system and shut-off valves as "fail safe" (Tr. 141-42). In further testimony, Mr. Hirt stated that a process upset or flame-out did not result in hazardous emissions of any magnitude, because "(y)ou shut the plant down" (Tr. 151). He based this testimony on 40 years of experience and the fact that the incinerator passed Los Angeles air quality regulations.
24. Mr. Robert Sterrett is the Manager, Environmental Engineering for Ashland (Tr. 157). He testified that the Notification of Hazardous Waste Activity and Part A permit application were prepared and filed under his supervision (Tr. 158). Regarding the Notification of Hazardous Waste

Activity, he asserted that in order to be safe they had checked all the boxes so as to be certain of achieving interim status for all covered activities (Tr. 159). He explained that the Part A application was submitted, because Ashland was uncertain as to whether materials being incinerated would be classified, as Ashland thought they should be, as D001, ignitable waste. In an aside, Mr. Sterrett stated that Ashland submitted approximately 80 initial Notifications of Hazardous Waste Activity and Part A permit applications and was working on about 25 Part B permit applications during the period September 30, 1982, through April 4, 1983.

25. Mr. Sterrett was of the opinion that material leaving the boiler stack, which is where materials leaving the incinerator are conducted, could not retain the characteristic of ignitability, because it had gone through a 1400-degree temperature zone and any organic material would have been combusted (Tr. 162-63). He referred to the Truesdail Tests as indicating that the carbon level, non-CO₂ carbon level within the gas, was in the 56 ppm range. He testified that the material [after passing through the incinerator] did not have any other characteristic of hazardousness such as reactivity or toxicity and that the waste stream produced by a resin reactor process was not a listed hazardous waste. He further testified that the Ashland facility was directly connected to an industrial production process, was constructed of impermeable materials and posed a negligible potential for the release of hazardous waste to the environment (Tr. 163-64). In other testimony, he maintained that the Ashland incinerator was part of the manufacturing process (Tr. 165).

26. A "totally enclosed treatment facility" is defined in 40 CFR 260.10 as follows:

"Totally enclosed treatment facility" means a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment. An example is a pipe in which waste acid is neutralized"

27. The regulatory clarification memorandum on the meaning of the term "totally enclosed treatment facility," referred to in finding 15, was originally issued in July 1981 (Tr. 36) and has apparently been reissued without change as recently as February 1983 (Complainant's Exh 2). The memorandum points out that a facility meeting the definition of totally enclosed is exempted from the requirements of 40 CFR Parts 264 and 265 and, by extension, the owner or operator of that facility need not notify [file a Notification of Hazardous Waste Activity] or seek a permit for that process. The stated purpose of the exemption is to remove from active regulation those treatment processes which occur in close proximity to the process which generates the waste and are constructed in such a way that there is little or no potential for escape of pollutants. It is pointed out that the facility must be constructed so that no predictable potential for overflows, spills, gaseous emissions, etc., can result from malfunction of pumps, valves, etc., associated with the totally enclosed treatment or from a malfunction in the industrial process to which it is connected. The memorandum states that as a practical matter, the definition limits "totally enclosed treatment facilities" to pipelines, tanks, and to other chemical, physical and biological treatment operations which are

carried out in tank-like equipment (e.g., stills, distillation columns or pressure vessels) and which are constructed and operated to prevent discharge of potentially hazardous material to the environment (Id. at 2). Noting that many tanks incorporate vents or relief valves, the memorandum provides that such vents must be designed to prevent overflows of liquids and emissions of harmful gases and aerosols, where such events might occur through normal operation, equipment failure or process upset (Id. at 3). A vented tank could qualify as totally enclosed provided it was equipped with protective devices adequate to prevent overflows or gases emissions passing through the vent from reaching the environment.

28. The regulatory clarification memorandum referred to in the previous finding further points out that the exemption for totally enclosed treatment facilities applies only to the facility itself and that effluent from the facility may still be regulated. The memorandum provides in part: "(i)f waste entering the totally enclosed treatment is listed in Subpart D of Part 261, then effluent from the facility is automatically a hazardous waste and must be treated as such, unless it is 'delisted' in accordance with §§ 260.20 and 260.22. If, on the other hand, the waste entering the totally enclosed treatment facility is hazardous because it meets one of the characteristics described in Subpart C of Part 261, then the effluent waste is a regulated hazardous waste only if the effluent meets one of the characteristics" (Id. at 6). The memorandum concludes by stating that a "totally enclosed treatment facility" must:

- "(a) Be completely contained on all sides.
- (b) Pose negligible potential for escape of constituents to the environment except through natural calamities or acts of sabotage or war.
- (c) Be connected directly by pipeline or similar totally enclosed device to an industrial production process which produces a product, byproduct, intermediate or a material which is used back in the process."

29. Mr. Alfred Lindsey, Deputy Director of the Waste Management and Economics Division in EPA Headquarters, was the principal author of the previously mentioned regulatory clarification memorandum (Tr. 36). In his view, an incinerator would not meet the definition of a totally enclosed treatment facility, because the stack did not pose a negligible potential for release of [hazardous] constituents to the environment (Tr. 38). He explained that stacks are meant to emit constituents in some form. He stated that not only do incinerators emit some of the organic or inorganic constituents that go into them, but that incinerators were subject to variations in the waste stream being fed thereto and also malfunctions of equipment, such as plugging of nozzles, failure of pumps and flame-outs (Tr. 40). In the latter case, he said that there would generally be a puff of more concentrated emissions. He stated that the "totally enclosed treatment facility" exemption was only meant to apply where there was a virtual zero potential for any emission, leak or overflow to escape to the environment and expressed the opinion that an incinerator could not meet that criterion, because it is generally designed to emit gases generated in the incineration process (Tr. 41). In further testimony, he asserted that he could not conceive that an incinerator used for the disposal of hazardous waste could meet the definition of totally enclosed, because all incinerators of which he was aware emitted to the atmosphere (Tr. 43-44).

30. Mr. Lindsey was cross-examined with reference to the definition of a totally enclosed treatment facility (finding 26), which includes as an example a pipe in which neutralization of waste acid takes place. He acknowledged that if a substance flowed into a pipe, something would usually have to flow out (Tr. 60). He pointed out, however, that the exemption applied only to the facility and if the substance going into the pipe was a listed hazardous waste [40 CFR Subpart D], then the effluent or material coming out of the pipe would be regulated unless it was delisted [in accordance with 40 CFR 260.20 or 260.22] (Tr. 58, 60, 61). If the reason the waste was hazardous was because it exhibited a characteristic listed in 40 CFR Subpart C, i.e., ignitability, corrosivity, reactivity or EP toxicity, the waste would no longer be regulated, provided the owner or operator could demonstrate that after treatment it did not retain that characteristic (Tr. 58, 59).
- Mr. Lindsey also pointed out that while only contained gases such as those in cylinders, etc., were regulated wastes under RCRA, if the treatment process emitted gases to the atmosphere, the facility would not be totally enclosed (Tr. 59). Referring to that part of the definition of a totally enclosed treatment facility (finding 26) "which prevents the release of any hazardous waste or any constituents thereof into the environment during treatment," he stated that "constituents" referred to those in [40 CFR] Appendix VIII (Tr. 67).
31. Ms. Cynthia Jackson was formerly a senior environmental engineer in the Technical Assessment Section of EPA's Region IX. Her primary duties concerned RCRA permitting and the training of engineers (Tr. 70). She testified that the form letter, dated September 30, 1982, sent to various companies operating incinerators, including Ashland (Complainant's Exh 5),

whereby the Part B permit applications were required to be submitted or called in, was the next step in the RCRA permitting process (Tr. 75). She stated that the information could not generally be obtained without the Part B application and that without that information the permitting process could not be completed (Tr. 76, 77). Referring to information submitted by Ashland in response to a motion for discovery, she asserted that what was missing was a complete, detailed chemical and physical analysis of the waste coming to the incinerator (Tr. 85). She explained that if the waste was only ignitable, it was not necessary for an applicant to demonstrate performance of its incinerator, but that if the waste contained any principal organic constituents, it was necessary to make a determination based on a "trial burn," whether the incinerator met the performance criteria of the regulations (Tr. 86). In either case, a permit was required. The regulations require a destruction and removal efficiency (DRE) of 99.99 percent of the principal organic hazardous constituents (POHCs) (Tr. 87).

32. Asked whether the fact the Ashland incinerator operated at 1400 degrees Fahrenheit had any effect on whether the incinerator was regulated, Ms. Jackson replied in the negative, stating that the incinerator was regulated, if input to the incinerator was hazardous waste (Tr. 88). She explained that there were three T's of combustion (temperature, turbulence and time) and that you could not look at one factor in isolation to determine if the incinerator complied, because a complex organic may pass "right on through" the incinerator.
33. According to Ms. Jackson, an incinerator could not qualify as a totally enclosed treatment facility, because there was no such thing as perfect combustion and there was always the possibility for hazardous waste

constituents to go out the stack (Tr. 89, 90). She was of the opinion that there could not be a combustion process that would meet the definition of a totally enclosed treatment facility. Her opinion was not dependent on whether the incinerator burned characteristic waste as distinguished from listed waste (Tr. 92).

34. Mr. Randolph Chrismon is coordinator for incinerator permit policy in EPA Headquarters (Tr. 10). He referred to the list of hazardous constituents in Appendix VIII of 40 CFR Part 261 and stated that the regulations required a DRE of 99.99 percent of these constituents (Tr. 11, 12). He testified that if the waste fed into the incinerator was a RCRA hazardous waste, the incinerator was subject to regulation (Tr. 15). He pointed out that under the definition of a totally enclosed treatment facility, the unit had to be designed and operated so that hazardous waste or its constituents could not be emitted to the environment (Tr. 16). Examining a process schematic of the Ashland facility (Complainant's Exh 1A), he noted that the incinerator emits 3000 standard cubic feet per minute (SCFM) of exhaust gases and stated he could see no way the Ashland incinerator could be considered totally enclosed. He confirmed Ms. Jackson's testimony (finding 31) that the most significant information needed in order to permit the Ashland facility was a physical and chemical analysis of the waste streams being incinerated (Tr. 17).
35. Regarding a pipe in which neutralization of waste acid takes place as an example of a totally enclosed treatment facility, Mr. Chrismon indicated that this met the definition, because it was constructed so that there would not be any leaks and because neutralization takes place totally within the confines of the pipe (Tr. 26).

Conclusions

1. Incineration is a process designed to change the physical, chemical or biological character or composition of any hazardous waste and therefore constitutes treatment within the meaning of § 1004(34) of the Act (42 U.S.C. 6903(34)) and regulations (40 CFR 260.10).
2. Hazardous wastes fed into the incinerator at the Ashland facility here concerned consist of vapors (fumes) and liquids.
3. Wastes referred to in the previous finding which are fed into the incinerator include or contain acetone, maleic anhydride, methyl methacrylate, phthalic anhydride, toluene diisocyanate and xylene. These chemicals are included in the lists of hazardous commercial chemical products, manufacturing chemical intermediates or off-specification commercial chemical products contained in 40 CFR 261.33(f). Insofar as Ashland is concerned, however, these appear to be manufacturing process wastes within the meaning of the comment at 40 CFR 261.33(f) (note 3, supra) and because the wastes are not included in the lists in 261.31 or 261.32, the wastes are not "listed wastes."
4. Maleic anhydride, methyl methacrylate and phthalic anhydride are included in the list of hazardous constituents, 40 CFR 261, Appendix VIII.
5. A "hazardous waste constituent" means a constituent that caused the Administrator to list the hazardous waste in Part 261, Subpart D, of this chapter, or a constituent listed in Table I of § 261.24 of this chapter (40 CFR 260.10).
6. In order to be "totally enclosed" within the meaning of the definition in 40 CFR 260.10 (finding 26), a facility for the treatment of hazardous waste must be directly connected to an industrial production process and must be constructed and operated in such a manner as to

prevent the release of any hazardous waste or any constituent thereof to the environment during treatment. (emphasis supplied)

7. Although liquid wastes fed to the incinerator are hazardous only because the wastes are ignitable, gases from the Ashland treatment process are discharged to the atmosphere after being routed through the stream boiler and because these gases may contain hazardous waste or one or more of the hazardous waste constituents listed in 40 CFR 261, Appendix VIII, the Ashland treatment facility is not totally enclosed within the meaning of the cited definition and the facility, but not the emissions therefrom, is subject to RCRA regulation.
8. Ashland may be compelled to submit Part B of the hazardous waste management facility permit application and is liable for a civil penalty for refusing to do so.

Discussion

At the outset, it should be noted that although incineration clearly constitutes treatment as defined in the Act and regulations,^{4/} it is only because Ashland incinerates liquid hazardous wastes that the issue of the facility being subject to RCRA regulation arises. This is because only "contained gaseous material" is defined as solid waste in § 1004 of the Act (42 U.S.C. 6903 and 40 CFR 261.2) and "fume incinerators" as such are not subject to RCRA regulation.^{5/} Complainant agrees with this conclusion

^{4/} Ashland agrees with this conclusion (Post-Hearing Brief, dated May 23, 1984, at 6).

^{5/} See 47 FR No. 122, June 24, 1982, at 27530 providing in pertinent part:

"EPA agrees with commenters that fume incinerators are subject only to regulation under the Clean Air Act and does not intend that the Parts 264 and 265 regulations apply to these facilities. Fume incinerators which are used to destroy gaseous emissions from various industrial processes, for example, are not subject to regulation under RCRA. In general, the RCRA standards do not apply to fume incinerators since the input is not identifiable as a solid waste according to the definition set forth in § 261.2."

(Complainant's Response to Memorandum By Amicus, dated May 24, 1984).^{6/}

This should satisfy amicus who appears to be concerned that this proceeding might result in fume incinerators being regulated under RCRA.

Ashland contends that its facility is excluded from RCRA permitting requirements, because it meets all of the conditions necessary to satisfy the definition of a totally enclosed treatment facility (40 CFR 260.10) in that the facility is for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste of any constituent thereof to the environment during treatment (Post-Hearing Brief at 5-7). Testimony of Mr. Sterrett (finding 25) and the schematic (Respondent's Exh 1) establish that the incinerator is directly connected to an industrial production process and Complainant has made no attempt to controvert that testimony. Accordingly, it is concluded that Respondent's treatment facility (incinerator) is directly connected to an industrial production process and thus complies with the quoted portion of the definition of a totally enclosed treatment facility.

Ashland points to Mr. Mork's testimony (finding 14 and 15) that the system is specifically designed to be tight in order to preclude leaks of odorous vapors into the air and is constructed of stainless steel and not subject to corrosion or leakage (Brief at 7). Ashland asserts that the system is equipped with automatic shut-off equipment to shut the operation

6/ Alpha Corporation of Tennessee moved for and was granted permission to file a memorandum as amicus curiae. The memorandum entitled "Memorandum By Amicus Curiae In Support Of Exclusion of Fume Gas Incinerators From Regulation Under RCRA," dated March 27, 1984, states, inter alia, that Alpha takes no position as to the facts before the Agency, but asserts that because only "contained gaseous materials" are solid wastes under RCRA, fume incinerators are not subject to RCRA regulations.

down if a process upset should occur, citing the testimony of Mr. Hirt (Finding 23). This assertion is considered to be erroneous, because although Mr. Hirt described the system as "fail safe," he did not specifically use the word "automatic" and it is noted that the report of inspection of July 28, 1983, states that valves used to control liquid waste feed to the incinerator are manually operated (finding 10).

Relying on the testimony of Mr. Sterrett (finding 25), Ashland states that no hazardous wastes or constituents thereof are released into the environment during treatment (Brief at 8). Mr. Sterrett did testify that the material had lost the characteristic of ignitability, because it had passed through a 1400 degree temperature zone and also that the waste did not have any other characteristic of hazardousness such as reactivity or toxicity. He further testified that the waste stream produced by a resin reactor process is not a listed hazardous waste. No issue has or could be taken with this latter assertion and it is clearly correct (40 CFR 261.32).

Ashland refers to the fact that Messrs. Lindsey and Chrismon testified that "constituents referred to those listed in Appendix VIII of 40 CFR 261 (findings 30 and 33). Ashland emphasizes Mr. Lindsey's testimony that Appendix VIII constituents were a list of several hundred materials which made a waste hazardous and caused it to be listed, but that these wastes were not hazardous in and of themselves (Tr. 53). Ashland also finds comfort in Mr. Lindsey's testimony to the effect that the presence of Appendix VIII constituents in a vapor stream exhibiting none of the Subpart C generic characteristics, the waste or the process not being listed by the Administrator, would not make the vapor stream hazardous (Tr. 54, 55).

Ashland argues that its evidence that its facility is totally enclosed has not been rebutted, that the conclusion of Messrs. Lindsey and Chrismon that the Ashland facility is not totally enclosed is based on the fact that incinerators by their very nature emit and that on cross-examination this assertion was shown to be erroneous (Brief at 9, 10). The latter statement is based largely upon Mr. Lindsey's acknowledgment, which Ashland asserts is a basic law of physics, that if something flows into a pipe something would usually have to flow out (finding 30). Ashland therefore argues that the mere fact that there is a discharge or an emission cannot be the controlling factor as to whether a facility qualifies as totally enclosed within the meaning of the definition (40 CFR 260.10). Ashland contends that prohibited emissions [in order for a system to be totally enclosed] are leaks or discharges within the system and not "end of pipe" or exhaust discharges and that Complainant's witnesses have confused the two types.

Ashland points out that uncontained gases are not hazardous wastes under RCRA and asserts that the presence or absence of Appendix VIII constituents is irrelevant, because this list is included in the regulation to provide the basis for listing a particular waste stream as hazardous, which in this instance the Administrator has not chosen to do (Brief at 13). Ashland argues that if the emission is an uncontained gas and the waste combusted by the incinerator is not listed by the Administrator, then the emission is not a RCRA hazardous waste. It states that if the emission is not a RCRA hazardous waste, the facility is not releasing hazardous waste or constituents thereof to the environment (Brief at 14).

Complainant appears to take the position that this case principally involves EPA requesting information, which Respondent has refused to supply, for it contends that Ashland may be required to submit Part B of the permit

application or equivalent information, even if Ashland's facility is totally enclosed within the meaning of 40 CFR 260.10 (Brief at 29, 30). This contention is rejected, because contrary to Complainant's assertion (Brief at 16), the totally enclosed treatment facility exemption is applicable not only to facilities operating under interim status (40 CFR 265.1(c)(9)), but also to permitting standards (40 CFR 264.1(g)(5)) and to the permitting program (40 CFR 270.1(c)(2)(iv)). Accordingly, there can be little doubt that if Ashland's facility is totally enclosed within the meaning of the definition in 40 CFR 260.10, it may not be required to submit Part B of the HWM facility application.^{7/} Complainant also excepts to the fact that the Part B application was not submitted, because Ashland determined that its facility was totally enclosed, asserting that the Act does not contemplate that such determinations will be made by members of the regulated community, which will stand unless and until challenged by EPA (Brief at 22). This assertion reflects a misunderstanding of the statutory and regulatory scheme and is erroneous.^{8/} If a firm claiming the totally enclosed treatment facility exemption has no need to file a Notification of Hazardous Waste Activity, that determination or claim almost certainly will stand unless the firm determines otherwise or until the determination is controverted in judicial or administrative proceedings similar to the instant one. Complainant is, of course, not required to accept such claims and has ample authority under

^{7/} This conclusion is in accord with the regulatory clarification memorandum, which indicates, inter alia, that a totally enclosed treatment facility need not file a Notification of Hazardous Waste Activity (finding 27).

^{8/} It is clear that an individual or firm generating, treating or disposing of waste will make the initial determination, after issuance of EPA regulations identifying or listing hazardous waste, of its obligation to file a Notification of Hazardous Waste Activity (§ 3010 of the Act, 40 CFR Part 260, Appendix I and 270 1(b)). See also the comment at 40 CFR 261.20(a) to the effect that it is the generator's responsibility to determine whether his waste exhibits one or more of the characteristics identified in this Subpart. Essentially the same conclusion follows as to the obligation to file a Part A permit application (§ 3005 of the Act and 40 CFR 270.10).

§§ 3007 and 3013 of the Act to conduct inspections and otherwise obtain or require the submission of information necessary for implementation and enforcement of the Act. Complainant, however, has not purported to act under either of the cited sections of the Act and no issue pertaining thereto is before me.

Ashland's contention that its facility meets all of the requirements for a totally enclosed treatment facility within the meaning of 40 CFR 260.10 fails to accord sufficient significance to that part of the definition "which prevents the release of hazardous waste or any constituent thereof to the environment during treatment." Although hazardous waste constituents includes those listed in Table I of 40 CFR 261.24, for present purposes, the term means those listed in 40 CFR Part 261, Appendix VIII.^{9/} Ashland contends that its waste is hazardous solely because it is ignitable. Although this may well be true,^{10/} waste fed to the incinerator appears to include at least maelic anhydride, methyl methacrylate and phthalic anhydride from the list of toxic constituents in Appendix VIII. The crux of Ashland's argument is, of course, that the waste not being listed, the mere presence of these constituents does not make a waste hazardous and because uncontained gases

^{9/} As Ashland points out, the regulation (40 CFR 261.20(a)(3)) provides that the Administrator shall list a solid waste as hazardous only upon determining that it, inter alia, contains any of the toxic waste constituents listed in Appendix VIII, unless it is determined that when improperly managed it is not capable of posing a substantial present or potential hazard to human health or the environment. As indicated (conclusion 3), wastes here concerned are not listed hazardous wastes.

^{10/} Complainant has made no attempt to controvert Ashland's contention its wastes are hazardous solely because they are ignitable. This being accepted as accurate, the waste is nevertheless hazardous until it passes through the incinerator at which point it would seem no longer to be hazardous, because, in accordance with 40 CFR 261.3(d)(1), it would not exhibit any characteristics of hazardous waste identified in Subpart C.

in its incinerator emissions are by definition not RCRA hazardous wastes, there cannot be an emission of a hazardous waste or any constituent thereof to the environment during the treatment process. This argument fails to recognize that there can be an emission or a potential emission of hazardous waste or a constituent thereof even if the constituent is not the reason for the waste being hazardous^{11/} and that it is the incinerator or the process that is regulated and not the emissions therefrom.

The Background Document (note 11, supra) provides the rationale for regulating incinerators. It points out that:

"However, incineration of hazardous waste also poses a potential threat to human health if not properly conducted and controlled. This threat stems primarily from the potential emissions of hazardous substances into the air during incineration. This potential exists because the flow of air into the incinerator for combustion purposes can carry out with it part of the unburned waste fed into the incinerator. Unless captured in an emission control device, the waste will be discharged into

^{11/} The rationale for this conclusion is provided in the preamble to the Incinerator Standards (46 FR No. 15, January 23, 1981, at 7673) providing:

"Commenters suggested that incineration of wastes which are hazardous solely because of ignitability should not be subject to incineration regulations. EPA agrees in principle and, as mentioned above, has exempted such wastes from most of the substantive requirements of Part 264, Subpart O. However, applicants must show in a permit application that an ignitable waste does not contain toxic organic constituents listed in Part 261, Appendix VIII. This showing must be based on an analysis of the waste for any organic constituents listed in Appendix VIII, except those that can be demonstrated not to be reasonably likely to be in the waste. This showing is necessary because wastes which fail the ignitability characteristic described in Part 261 may also contain toxic organic constituents. Even wastes listed solely for ignitability may contain such constituents if the Agency did not have exhaustive composition data at the time of listing. Since toxic organic constituents must be destroyed in an incinerator in accordance with the performance standard, any ignitable waste containing such constituents is subject to all of the Subpart O standards.

See also the Background Document "Incineration Standards" (40 CFR 264 and 265, Subpart O, December 1980), referenced 46 FR at 7666, at 80, 81.

"the air. Similarly, if combustion is incomplete, hazardous combustion by-products, or recombipants, may be formed in the combustion zone and subsequently emitted from the stack.

The potential for damage to human health and the environment from these emissions is related to several factors: the mass emission of hazardous substances from the stack, the dispersion of these emissions and extent of exposure of humans or other organisms to them, and the health impacts of these substances due to exposure" (Id. at 11, 12).

The conclusion that incinerators are not totally enclosed is supported by the preamble to the May 19, 1980, RCRA regulations (45 FR at 33218) providing in pertinent part:

"Persons who handle hazardous waste in what they believe to be a 'totally enclosed treatment facility' should carefully read the definition of that term in § 260.10 of this Chapter. The key characteristic of such a facility is that it does not release any hazardous waste or constituent of hazardous waste into the environment during treatment. Thus, if a facility leaks, spills, or discharges waste or waste constituents, or emits wastes or waste constituents into the air during treatment, it is not a 'totally enclosed treatment facility' within the meaning of these regulations.

Another important characteristic of a totally enclosed treatment facility is that it must be directly connected to an industrial production process. Thus, such a facility located at an off-site hazardous waste management facility does not qualify for exclusion from these regulations.

After treatment in a totally enclosed treatment facility, the resulting discharge, treatment residue, etc., may be a hazardous waste and subject to regulation under this Part. Owners and operators of such facilities should consult § 261.3 of this Chapter to determine whether that is the case."

That incinerators were not intended to be included in the definition of totally enclosed treatment facilities is considered to be further supported by the waivers from Subpart O (Incinerator) requirements, save for 264.341 (Waste

Analysis) and 264.351 and 265.351 (Closure) authorized for interim status facilities^{12/} and in permit conditions.^{13/} Because of the presence of Appendix VIII toxic constituents, Ashland is, however, not eligible for

^{12/} Interim status standards applicable to incinerators (40 CFR 265.340 provide in pertinent part:

"(a) The regulations in this subpart apply to owners or operators of facilities that treat hazardous waste in incinerators, except as § 265.1 and paragraph (b) of this section provide otherwise.

(b) Owners and operators of incinerators burning hazardous waste are exempt from all of the requirements of this subpart, except § 265.351 (Closure), provided that the owner or operator has documented, in writing, that the waste would not reasonably be expected to contain any of the hazardous constituents listed in Part 261, Appendix VIII, of this chapter, and such documentation is retained at the facility, if the waste to be burned is:

* * *

(3) A hazardous waste solely because it possesses the characteristic of ignitability, corrosivity, or both, as determined by the tests for characteristics of hazardous wastes under Part 261, Subpart C, of this chapter; or

* * * *"

^{13/} Permitting standards applicable to incinerators (40 CFR 264.340) provide in pertinent part:

"(a) The regulations in this Subpart apply to owners and operators of facilities that incinerate hazardous waste, except as § 264.1 provides otherwise.

(b) After consideration of the waste analysis included with Part B of the permit application, the Regional Administrator, in establishing the permit conditions, must exempt the applicant from all requirements of this Subpart except § 264.341 (Waste analysis) and § 264.351 (Closure).

(1) If the Regional Administrator finds that the waste to be burned is:

* * *

(iii) A hazardous waste solely because it possesses the characteristic of ignitability, corrosivity, or both, as determined by the test for characteristics of hazardous wastes under Part 261, Subpart C, of this chapter; or

* * * *"

the automatic waiver specified by 40 CFR 264.340 and 265.340, but may be eligible for such a waiver, provided it is able to establish that waste to be incinerated contains only "insignificant concentrations" of Appendix VIII constituents.^{14/}

13/ continued

"(2) If the waste analysis shows that the waste contains none of the hazardous constituents listed in Part 261, Appendix VIII, of this chapter, which would reasonably be expected to be in the waste.

(c) If the waste to be burned is one which is described by paragraphs (b)(1)(i), (b)(1)(ii), (b)(1)(iii), or (b)(1)(iv) of this section and contains insignificant concentrations of the hazardous constituents listed in Part 261, Appendix VIII, of this Chapter, then the Regional Administrator may, in establishing permit conditions, exempt the applicant from all requirements of this Subpart, except § 264.341 (Waste analysis) and § 264.351 (Closure), after consideration of the waste analysis included with Part B of the permit application, unless the Regional Administrator finds that the waste will pose a threat to human health and the environment when burned in an incinerator.

* * * *

14/ See 40 CFR 264.340(c) (note 13, supra). The rationale for this conclusion is provided in the preamble to the amended regulations applicable to incinerators (47 FR No. 122, June 24, 1982, at 27520), which provides:

"Today's amendment allows an ignitable, corrosive, or reactive waste in which none of the hazardous constituents listed in Appendix VIII of Part 261 have been detected to be exempted without further consideration of its content. The Regional Administrator's review of the waste analysis plan and data, both of which accompany Part B of the permit application, is necessary in this case in order to determine that the sampling and analysis methods used and the data generated show that no hazardous constituents are present at levels which can be detected by the analytical methods required by § 122.27 (i.e., those specified in SW-846, "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods"). Although the exact detection limits vary for specified constituent, those present in concentrations below 1 part per million (ppm) in the waste generally will not be detected.

Having concluded that the potential for gaseous emissions, resulting from the combustion of liquid hazardous waste at Ashland's facility, to include hazardous waste or constituents thereof precludes the facility from qualifying as totally enclosed within the meaning of 40 CFR 260.10, Ashland's arguments based on the regulatory clarification memorandum need not long detain us. There is nothing in the memorandum inconsistent with the conclusion that an incinerator by its very nature is unlikely to meet the definition of totally enclosed which requires that such a facility be "constructed and operated in such a manner as to prevent the release of

14/ continued

"Since small, but detectable, concentrations of Appendix VIII hazardous constituents may not always pose a hazard to human health when incinerated, the amended regulation also provides the Regional Administrator may grant an exemption when low concentrations of hazardous constituents are detected in the waste. One litigant criticized this provision as too lenient. However, if EPA provided no allowance for trace contaminants, the exemption would be unworkable. In making a determination regarding exemption in this case, the Regional Administrator may begin by considering the concentration of each hazardous constituent found in the waste feed and estimating the concentration (e.g., by assuming 99.99% destruction and removal) which will result in the stack gas.

EPA estimates indicate that constituents present in the waste feed in concentrations as low as 1000 ppm will be routinely detected by stack gas analysis and that a waste concentration of 100 ppm probably represents a practical lower limit beyond which determination of 99.99% destruction and removal will be difficult to document. Stack gas concentrations resulting from 99.99% destruction and removal of constituents present in the waste feed in concentrations below 100 ppm can generally be measured only through the use of sampling and analysis techniques which exceed the capabilities of those recommended in EPA's guidance manual (Sampling and Analysis Methods for Hazardous Waste Incineration) and the Regional Administrator may presume they are allowable for purposes of the exemption." (Id. at 27525-26)

See also the Background Document "Incineration Standards" (40 CFR 264 and 265, Subpart O, June 1982), referenced 47 FR at 27522, at 33.

any hazardous waste or any constituent thereof to the environment during treatment" (emphasis supplied). That the waste is unlisted does not alter the fact that it is hazardous until treated. Nor does the fact that the gaseous emissions from the incinerator are uncontained and therefore not RCRA regulated wastes necessarily mean that no portion of a regulated liquid hazardous waste or a constituent thereof will escape to the environment during treatment.

The regulatory clarification memorandum points out that as a practical matter totally enclosed treatment facilities are limited to pipelines, tanks and similar equipment and deals with emissions in part by stating in effect that there must be no predictable potential for gaseous emissions resulting from malfunctions (finding 27). While noting that a vented tank could qualify as totally enclosed provided the vent was effectively protected by protective devices,^{15/} the memorandum points out that the adequacy of such devices depends on whether such overflows or gaseous emissions passing through the vent will be prevented from reaching the environment. This supports Mr. Lindsey's testimony that in order to qualify as totally enclosed there must be a virtual zero potential for any emission, leak or overflow to escape to the environment (finding 30).

Ashland's assertion, ante at 25, that Complainant's witnesses have confused impermissible in process emissions, leaks, etc., with permissible "end of pipe" exhausts and discharges is considered to be erroneous. While it is, of course, true that the example of a totally enclosed treatment facility as a pipe in which waste acid is neutralized necessarily contemplates

^{15/} As Ashland notes (Brief at 20), an incinerator is given as an example of such a protective device. While this demonstrates that the authors of the memorandum contemplated incinerators, it does not establish that incinerators can be totally enclosed, because the incinerator in the example is merely a back-up device to a vent.

some flow or discharge from the pipe (at least if a continuous operation be assumed), the key fact is that neutralization takes place solely within the confines of the pipe (finding 35). The discharge may or may not be hazardous and thus subject to regulation (findings 28 and 30).

Although the case was not tried on that theory, counsel for Ashland contended in his opening statement (Tr. 108) and contends on Brief at 22, et seq. that, inasmuch as exhaust gases from its incinerator are routed through the boiler for the purpose of generating steam to operate the plant, it is entitled to the exclusion for wastes being beneficially used or re-used or legitimately recycled or reclaimed specified by 40 CFR 261.6.^{16/}

It is clear that a material burned for the purpose of recovering usable energy is not intended to be discarded and therefore is not a waste.

The preamble to the initial RCRA regulation (45 FR 33091-93, May 19, 1980) reflects that RCRA Subtitle C regulation of the use and re-use of hazardous waste and hazardous waste recycling and reclamation activities was deferred primarily because proposed (and final) treatment and disposal standards were not considered well-suited for hazardous waste recycling and reclamation operations or for uses and re-uses of hazardous wastes. It was

^{16/} The cited section provides in pertinent part:

"(a) Except as otherwise provided in paragraph (b) of this section, a hazardous waste which meets any of the following criteria is not subject to regulation under Parts 262 through 265 or Parts 270, 271, and 124 of this Chapter and is not subject to the notification requirements of Section 3010 of RCRA until such time as the Administrator promulgates regulations to the contrary:

(1) It is being beneficially used or re-used or legitimately recycled or reclaimed.

(2) It is being accumulated, stored or physically, chemically or biologically treated prior to beneficial use or re-use or legitimate recycling or reclamation."

made clear, however, that the deferral applied only to bona fide legitimate and beneficial uses and recycling of hazardous wastes.^{17/}

A RCRA Enforcement Guidance Memorandum, Subject: "Burning Low Energy Hazardous Wastes Ostensibly for Energy Recovery Purposes" (48 FR No. 52, March 16, 1983, at 11157) makes its clear that one of the primary factors in considering whether the burning of a waste constitutes legitimate recycling or the sham incineration of hazardous waste is the energy value of the waste. If a low energy waste is burned in an industrial boiler, the primary purpose of the burning is considered to be destruction of the waste rather than generation or recovery of energy and such burning does not constitute legitimate recycling. In order to prevent easy circumvention of the regulation, burning mixtures of wastes and non-waste fuel where the wastes have little or no energy value and practices where wastes with little or no heat value are knowingly added to material intended to be burned as fuel are likely to be considered "sham" recycling and not covered by the exemption.

The memorandum indicates that wood, which when used as a fuel, has values ranging from 5,000 to 8,000 BTU per pound should be used a benchmark in determining which wastes have low heating values. The memorandum further

^{17/} The preamble (45 FR 33093) provides in pertinent part:

"This temporary deferral, it should be noted is confined to bona fide "legitimate" and "beneficial" uses and recycling of hazardous wastes. Sham uses and recovery or reclamation activities--e.g., "landfilling" or "land reclamation" which is actually disposal and burning organic wastes that have little or no heat value in industrial boilers under the guise of energy recovery--are not within its scope and, if conducted in violation of Subtitle C requirements, will be subject to enforcement under Section 3008 of RCRA. In enforcing this provision, EPA will be particularly suspicious of use, and reclamation operations which were not conducted prior to the publication of these regulations."

indicates that evidence such as the net cost savings resulting from burns allegedly for energy recovery purposes and whether the primary purpose of the burn was to dispose of, rather than recycle hazardous wastes, are relevant to EPA's enforcement determination.

Applying these guides to the instant case, it would appear to be clear that the primary purpose for Ashland's burning of the aqueous portion (water of esterification) of the liquid waste stream in the incineration, which prior to the 1982 modification^{18/} was discharged to the sewer system, is clearly destruction of the waste and not energy recovery. The purpose of incinerating the non-aqueous portion of the liquid waste stream is not as clear. It is noted, however, that maleic anhydride with a value of 6,116 BTUs per pound is included in the list of low energy hazardous waste constituents attached to the referenced memorandum (48 FR 11160) under which EPA presumes that the primary purpose of the burning is destruction rather than energy recovery. Although the cited memorandum also states (48 FR 11159) that "(s)pent benzene and spent acetone, for example, have high fuel value, as do most other ignitable wastes," it is concluded that Ashland has not established its contention that primary purpose of burning of wastes here involved was energy recovery and thus that such burning constitutes legitimate recycling. Ashland is, accordingly, not entitled to the exemption for recycling set forth in 40 CFR 261.6.

As indicated (note 2, supra), the regulation (40 CFR 270.10(e)(4)) provides that at any time after promulgation of Phase II the owner and operator of an existing HWM facility may be required to submit Part B of their permit application. This is clear and unambiguous and appears to be amply authorized

^{18/} Quaere: Whether this modification should have been made absent the filing of a revised Part A permit application? See 40 CFR 270.72 and 45 FR 76633-34, November 19, 1980 (discussion of "same waste requirement" in order to qualify as an existing HWM facility).

by § 3005(a) of the Act (42 U.S.C. 6925), which provides, inter alia, that " * * * the Administrator shall promulgate regulations requiring each person owning or operating a facility for the treatment, storage or disposal of hazardous waste identified or listed under this subtitle to have a permit issued pursuant to this section."^{19/}

In City Industries, Inc., RCRA 83-160-R-KMC, Order On Motion (October 4, 1983),^{20/} however, Judge Yost ruled that the Act did not require the owner or operator of a HWM facility to apply for a permit; that, accordingly, no penalty could be assessed for the operator's failure to do so and that the Agency's sole remedy was revocation of interim status and prosecution for operating without a permit, if the facts so warranted. The facts in that case were that City Industries had qualified for interim status, had submitted initial and revised Part B applications which the Agency deemed inadequate, had failed to comply with an Agency deadline for submitting an adequate Part B application and that its application for a permit had been denied. The Agency contended that it could both deny the permit and assess a penalty for failure to apply. Dictum in Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983) at 806-07 is to the effect that a facility failing to submit a Part A or Part B application when called upon to do so must stop operations on the effective date the applications are due and thus appears to lend some support to Judge Yost's decision.

In L. H. Inc. and C & D Oil Co., Docket No. V-W-83-010 (Initial Decision, February 28, 1984), Judge Harwood, citing Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983), indicated that he disagreed with City Industries, Inc., supra, to the extent it held that the permitting requirements

^{19/} The Part B application calls for the submission of information necessary to the permitting process (finding 31).

^{20/} It is understood that this decision has been appealed.

of RCRA and regulations were not requirements which could be enforced by civil penalties. In Lamphier, a facility which discontinued receipt of hazardous wastes in March 1980 was, nevertheless, held to be operating a hazardous waste storage facility and an order requiring the operator to, inter alia, file notification of hazardous waste activity after August 19, 1980, to apply for a permit and to comply with interim status standards was upheld.

Because the regulation (40 CFR 270.10(e)(4)) unambiguously requires the submission of the Part B permit application when called for by the State Director or the Regional Administrator and because § 2002 of the Act (42 U.S.C. 6912) authorizes the Administrator to promulgate such regulations as are necessary to carry out his functions under the Act, it is concluded that Ashland may be compelled to submit Part B of HWM facility permit application. Even if Ashland is considered to have the option of shutting the facility down, nothing transpired at the hearing to indicate that it has any intention doing so and insofar as the record is concerned, it is clear, that the facility, including the incinerator, was in operation as of August 28, 1983.

Penalty and Compliance Order

Section 3008(c) of the Act (42 U.S.C. 6928) (note 1, supra) provides that any order issued under this section shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith attempt to

comply with applicable requirements.^{21/} In the initial Compliance Order, Ashland was assessed a penalty of \$2,500 and ordered to submit the Part B permit application within 15 days of service of the order. As Ashland persisted in its refusal to submit the Part B application, by Supplemental Compliance Order, dated July 13, 1983, all permits to operate or authorizations to operate as if a permit had been issued were revoked until Respondent fully complied with the previous order. After an inspection revealed that Ashland was continuing to operate in disregard of the Supplemental Compliance Order, a second DOV and Compliance Order was issued, which, inter alia, assessed a penalty of not less than \$1,000 for each and every day of Respondent's non-compliance with the Compliance Order, as supplemented, on and after June 1, 1983.

On its face, Ashland's actions herein or lack thereof constitute an intolerable recalcitrance. It should be noted, however, that counsel for Complainant acknowledged EPA made no claim Ashland was harming the public [or the environment].^{22/} Moreover, although Ashland's position herein has not been sustained, and this decision does not rest solely on their presence, it is considered somewhat anomalous that the presence or possible presence of Appendix VIII constituents can have regulatory significance even though

^{21/} The Final RCRA Civil Penalty Policy, dated May 8, 1984 (unpublished), issued by the Assistant Administrators for Enforcement and Compliance Monitoring and for Solid Waste and Emergency Response provides that it is applicable to all administrative actions instituted after the date of the policy and thus does not apply to this proceeding.

^{22/} Tr. 177. This acknowledgment is considered to be amply supported by the testimony of Messrs. Hirt and Sterrett (findings 21 and 25) to the effect that carbon levels within the exhaust gases were less than 70 ppm. See note 14, supra.

the Administrator has not seen fit to list such wastes as hazardous.^{23/} That such, however, was the intent is amply demonstrated by the preamble to the regulation and by the Background Document (ante at 28). The significance of the presence of Appendix VIII constituents is ascertainable from a careful reading of the Subpart O Incineration Standards (40 CFR 264.340, ante at 30, 31) and the regulation is considered not to be ambiguous so as to preclude the assessment of a penalty.^{24/}

Ashland points out, however (Reply Brief at 13), that among issues which the Agency acknowledged needed clarification was the totally enclosed treatment facility exemption (45 FR 55386-87, August 19, 1980) and that to date the only clarification issued has been the unpublished regulatory memorandum referred to in this decision. Ashland also emphasizes that the Subpart O Incinerator Standards, 40 CFR 264.340(a), (note 13, supra) provide that the regulations in this Subpart apply to owners and operators of facilities that incinerate hazardous waste, except as § 264.1 provides otherwise and that among the exclusions in § 264.1 is the owner or operator of a totally enclosed treatment facility. It is hardly necessary to add that if it was intended that an incinerator could not qualify as a totally enclosed treatment facility, it would have been a simple matter to include a comment or other provision to that effect.

^{23/} The background Document (note 11, supra) explaining the rationale for exempting ignitable only wastes from most of the incineration standards states in effect that such wastes are expected to be easily combustible and because they do not emit gases which are toxic (otherwise they would be listed for toxicity) release of their combustion products should be of minimal environmental or health concern (Id. at 81).

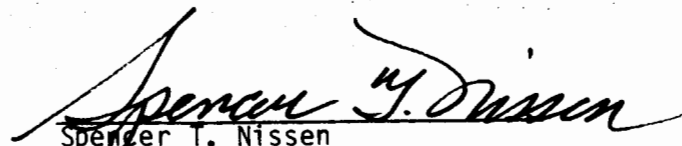
^{24/} In *Liberty Light and Power*, TSCA Appeal No. 81-4 (Decision of Judicial Officer, October 27, 1981) it was held that a penalty could not be assessed on the basis of an unclear and misleading regulation. Although obscured by assertions to the effect that remedial legislation is to be liberally construed in order to effectuate the statutory purpose, e.g., *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), this holding is considered to be hornbook law.

The purpose of a penalty is to deter further violations. It is clear that Ashland has pursued this matter in a good faith belief that its facility qualified as totally enclosed treatment facility and that its refusal to submit the Part B application, is serious only in the sense that the statutory permitting process has been delayed. Under all the circumstances, and because it is unlikely that Ashland will persist in its refusal to submit the Part B application after receipt of this decision, a penalty is considered appropriate only if it fails to comply with the order below. Ashland will be ordered to submit the Part B application within 30 days of the receipt of this decision. If Ashland fails to do so, a penalty of \$1,000 for each and every day of non-compliance on and after June 1, 1983, will be assessed.

Order

In accordance with 40 CFR 270.10(e)(4), Ashland is ordered to file the Part B hazardous waste management facility permit application with the Regional Administrator within 30 days of receipt of this decision. Failure to comply with this order will result in a penalty of \$1,000 for each every day of non-compliance on and after June 1, 1983, being assessed against Ashland.^{25/}

Dated this 21st day of June 1984.


Spencer T. Nissen
Administrative Law Judge

^{25/} Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final decision of the Administrator in accordance with 40 CFR 22.27(c).