RCRA Permit Appeal Fact Sheet **1988**

FACILITY: Amerada Hess (Port Reading) Corporation
Port Reading, New Jersey
NJD 045 445 483
RCRA Appeal No. 88-10

PETITIONER: Amerada Hess Corporation[1] (Amerada Hess)

PETITION FILED: May 20, 1988

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:
- Definition of solid waste management unit
- Other corrective action issues (financial assurance)
- Miscellaneous other issues (legal name of the permittee)

Summary of Petition:

Amerada Hess petitioned the Administrator to review conditions of the facility's final HSWA permit relating to a 500-gallon underground storage tank (Module II, Sections B.3, D, and H). The petitioner outlined two groups of issues to be reviewed: general issues concerning the scope of corrective action required by the permit, and specific issues concerning corrective action provisions of the permit. In addition, the petitioner noted that the legal name of the permittee was incorrectly identified in the permit, and requested that the permit be revised accordingly.

- **Definition of Solid Waste Management Unit.** In Module II, Section B.3 of the permit, EPA identifies as a solid waste management unit (SWMU) "the area around the excavated 500-gallon underground storage tank." Amerada Hess argued that the underground storage tank in question was never used for managing solid waste. Consequently, the area around the excavated tank should not be identified as a SWMU. The petitioner's arguments are as follows:

  - The tank, which was removed in April 1986, was used only for temporary storage of petroleum products and feedstock - specifically, it was associated with the refinery's removal of water from its product storage tanks. Product and feedstock were subsequently recovered from the tanks.

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[1] Amerada Hess Corporation is the corporate parent of Amerada Hess (Port Reading) Corporation.

- Based on the redefinition of solid waste and the recent decision in American Mining Congress v. Environmental Protection Agency, 824 F.2nd 1177 (D.C. Cir. 1987), Amerada Hess argued that petroleum products temporarily stored in the tank cannot be characterized as solid waste, since at no time had petroleum products been "discarded."

- EPA has no basis for asserting that hazardous wastes were ever stored in or released from the tank.

- **Financial Assurance.** Module II, Section D requires Amerada Hess to prepare soil sampling and analysis plans for this area. Module II, Section H requires Amerada Hess to demonstrate financial assurance for the implementation and completion of corrective action measures required by the permit. Amerada Hess argued that since the 500 gallon tank was not a SWMU, it does not trigger the application of either the corrective action requirements under RCRA Section 3004(u) or the associated financial assurance requirements. The petitioner's arguments are as follows:

  - EPA policy, as reflected in the National RCRA Corrective Action Strategy and "Guidance on Corrective Action for Continuing Releases," affirms that releases from product storage facilities are beyond the scope of RCRA Section 3004(u).

  - EPA policy also affirms that corrective action should only be applied in circumstances where it is necessary to protect human health and the environment. Since the tank was removed in a manner protective of human health and the environment (as outlined in the petition), corrective action is unnecessary.

- **Legal Name of the Permittee.** The petitioner noted that Amerada Hess (Port Reading) Corporation, a wholly-owned subsidiary of Amerada Hess Corporation, is the actual owner and operator of the Port Reading refinery and is the party to whom New Jersey issued the RCRA Part B permit. However, the party named in the permit issued by Region 2 is Amerada Hess Corporation, not Amerada Hess (Port Reading) Corporation. The petitioner requested that the permit issued by Region 2 be revised to correctly state the name of the permittee (i.e., Amerada Hess (Port Reading) Corporation).

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
Amerada Hess Corporation Port Reading Refinery	RCRA Appeal No. 88-10
RCRA Permit No. NJD 045 445 483	

ORDER DENYING REVIEW

Before me is a petition filed by Amerada Hess Corporation under 40 CFR §124.19 requesting review of a permit issued by U.S. EPA Region II under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §§6901-6991i (1983 & West Supp. 1988). The permit is for Hess's oil refinery in Port Reading, New Jersey. As requested by the Agency's Chief Judicial Officer, Region II filed a July 11, 1988 response to the petition ("Region Response").

Hess's petition raises a single issue. In 1986, Hess removed a 500-gallon underground storage tank from its facility. The permit characterizes the excavated area as a solid waste management unit ("SWMU"), and requires Hess to conduct soil analysis under RCRA §3004(u) [1] to determine whether the area is

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[1] See 42 U.S.C.A. §6924(u) ("Standards promulgated under this section shall require, and a permit issued after November 8, 1984 * * * shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit.")

contaminated. [2] Hess asserts that the tank stored only product and feedstock, not solid waste. Cf. 42 U.S.C.A. §6903(27) ("'solid waste' means any garbage, refuse * * * and other discarded material"); American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987); 53 Fed. Reg. 519 (January 8, 1988). Hess therefore concludes that the excavated area is not a SWMU subject to RCRA §3004(u), which by its terms is limited to releases from SWMUs. [3]

Analysis

The Region does not dispute Hess's assertion that the tank stored only product and feedstock. Despite the original status of the stored materials, however, a spill or release in the excavated area would be "solid waste" under RCRA because the spilled materials would be unquestionably discarded. Hess is correct that the Agency's RCRA jurisdiction does not extend to product or feedstock which is not otherwise solid waste. The disputed soil sampling requirements, however, are not directed toward the storage of product or feedstock, but instead address a potential release of solid waste to the environment.

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[2] The permit will be modified to require further corrective action efforts if the required soil analysis reveals a release in the excavated area. See Permit Condition II.E. Any such permit modification will afford the permittee an opportunity to appeal the modification administratively under 40 CFR Part 124.

[3] Despite its formal opposition to the soil analysis requirement, Hess states that it "is willing to consider undertaking investigative and other appropriate measures with regard to the area around the tank." Petition at 2 n.4.

Although a release in the excavated area would be solid waste, there would still be some question under RCRA §3004(u) as to whether the area is a "solid waste management unit." [4] Regardless of whether this area is a SWMU subject to RCRA §3004(u), however, adequate legal authority for the disputed requirements exists under RCRA §3005(c)(3). This "omnibus provision" allows the Agency to impose any permit term and condition necessary to protect human health and the environment. [5] In my view, this authority provides a sufficient legal predicate for requiring soil sampling for a suspected release from a non-SWMU. For an interim status facility, the statute expressly authorizes corrective action without regard to whether the

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[4] The term "solid waste management unit" includes areas contaminated by routine and systematic releases, but not by a one-time, accidental spill. See 50 Fed. Reg. 28712-13 (July 15, 1985); Memorandum from Marcia E. Williams, Office of Solid Waste, to Hazardous Waste Division Directors, Regions I-X (July 24, 1987) (Attachment 3 to Region Response). The Region argues that soil analysis might reveal that the excavated area is a SWMU, but fails to explain how such analysis could demonstrate a history of routine and systematic (as opposed to isolated and sporadic) spills.

[5] See 42 U.S.C.A. §6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment"); see also 40 CFR §270.32(b)(2); In re Ecolotec, Inc., RCRA Appeal 87-14, at 2-8 (Dec. 14, 1988); In re Chemical Waste Management, Inc., RCRA Appeal No. 87-12, at 3-5, 8-11 (May 27, 1988).

release originated from a SWMU or a non-SWMU. [6/] For a permitted facility, the omnibus provision may likewise be used to address a suspected release of solid waste, regardless of its source, where necessary to protect human health and the environment. [7/]

Release detection in the form of groundwater monitoring is routinely required for most units that manage hazardous waste, irrespective of whether there is a suspicion of a release. See 40 CFR §§264.91(a)(4), 264.98. The Agency has not found it necessary to require such routine monitoring for SWMUs, see 52 Fed. Reg. 45789 (December 1, 1987), but a RCRA permit applicant

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[6/] See RCRA §3008(h), 42 U.S.C.A. §6928(h) (authorizing corrective action orders for "a release of hazardous waste into the environment from [an interim status] facility"); see also Memorandum from J. Winston Porter and Courtney M. Price to Regional Administrators, et al., Interpretation of Section 3008(h) of the Solid Waste Disposal Act, at 8 (Dec. 16, 1985).

[7/] The Region's permit decision in this regard is consistent with the Agency's 1986 National RCRA Corrective Action Strategy, which recommends requiring corrective action for non-SWMUs under the omnibus provision. See Region Response, Attachment 2 at 10.

Although the specific command in RCRA §3004(u) for corrective action is limited to releases from SWMUs, this non-discretionary provision is best read as requiring such remediation as the minimum protection to be afforded by the RCRA rules and by every RCRA permit. The omnibus provision, however, gives the Agency discretion to go beyond the rules on a case-by-case basis to address unique circumstances at an individual facility. See S. Rep. No. 284, 98th Cong. 1st Sess. 31 (1983). In light of the Agency's authority to require corrective action for non-SWMUs at interim status facilities, Section 3004(u) should not be read as indirectly prohibiting the Agency from exercising its discretion to require such corrective action at permitted facilities under the omnibus provision. It would make little sense, both as a matter of statutory interpretation and as a matter of policy, for the Agency to address contamination from non-SWMUs at interim status facilities but to tolerate suspected releases from non-SWMUs at permitted facilities.

may be required to conduct soil sampling and other preliminary detection activities where necessary to determine whether a suspected release from a SWMU requires a more complete investigation. See 40 CFR §270.14(d)(3); 52 Fed. Reg. 45789 (December 1, 1987); 51 Fed. Reg. 10713 (March 28, 1986). For a suspected release from a non-SWMU, the threshold showing needed to justify such soil sampling should be derived from the language of the omnibus provision itself. In other words, such a requirement may be imposed for a suspected release from a non-SWMU if, in the words of the omnibus provision, it is "necessary to protect human health and the environment."

Region II plainly believes that such necessity exists in this case. Although the Region initially justified the requirements at issue under RCRA §3004(u), the same determination of necessity is required under that provision as under the omnibus provision. See 40 CFR §264.101(a); 50 Fed. Reg. 28713 (July 15, 1985). Hess challenges Region II's determination in this respect by asserting that the tank was structurally intact when it was removed. See Petition at 5-6. It fails, however, to provide any contemporaneous documentation to support this assertion. Even assuming this contention to be true, it would not rule out the possibility of spills while the tank was in use. Hess also asserts that it visually inspected the surrounding soil when the tank was removed, and that the excavated area was backfilled with clean soil. Id. The Region was aware of these contentions, but it nevertheless concluded that a "no release" confirmation by

soil analysis is necessary to protect human health and the environment due to the age of the tank and the absence of relevant historical records and field data. This decision is supported by the RCRA Facility Assessment conducted by the New Jersey Department of Environmental Protection, which characterizes the area as having a "suspected release" and concludes that "[s]oil sampling is warranted to determine whether or not a release may have occurred in the area." Region Response, Attachment 1 at Revised Narrative pp. 3-4, Preliminary Assessment at p.3.

Ordinarily, a Regional determination of this nature will not be reviewed under Section 124.19 unless it is clearly erroneous. See 45 Fed. Reg. 33412 (May 19, 1980). Federal courts have described comparable "clear error" standards as requiring a definite and firm conviction that a mistake has been made. [8/] The record shows that the tank had been in use prior to 1974 and remained in the ground until 1986. See Region Response, Attachment 1 at Revised Narrative p. 3 & Att. N. Given the age of the tank, the Agency's experience with underground storage tanks generally, [9/] and the absence of historical records or

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[8/] See, e.g., United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067, 1076 (1st Cir. 1986); Johnson v. U.S. Postal Service, 756 F.2d 1461, 1464 (9th Cir. 1985).

[9/] See, e.g., 51 Fed. Reg. 25422, 25428 (July 14, 1986) ("a significant number of existing tank systems are likely to be leaking, now or in the future"); see also 53 Fed. Reg. 37082 (Sept. 23, 1988); 52 Fed. Reg. 12662 (April 17, 1987); 50 Fed. Reg. 26444 (June 26, 1985).

field data, the petition fails to convince me that Region II's decision regarding the need for soil analysis constitutes clear error or otherwise warrants review.

Conclusion

For the reasons set forth above and in the Region Response, and based on the record before me, Hess's petition for review is denied. The Region is directed to revise the permit to provide that the conditions at issue are being imposed under RCRA §3005(c)(3), not Section 3004(u). [10/]

So ordered.

William K. Reilly
Administrator

Dated: AUG 15 1989

[10/] Region II is also directed to address Hess's request that the permit be modified to reflect that Hess's wholly-owned subsidiary owns and operates the refinery.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Amerada Hess Corporation, RCRA Appeal 88-10, have been sent to the following in the manner indicated:

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Dated: AUG 17 1989

Brenda H. Selden, Secretary
to the Chief Judicial Officer