RCRA Permit Appeal Fact Sheet **1989**

FACILITY: Chevron USA Inc. (Chevron)
Philadelphia, Pennsylvania
PAD 049 791 098
RCRA Appeal No. 89-26

PETITIONER: Chevron

PETITION FILED: October 26, 1989

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:
- RFI conditions are not justified
- Definition of solid waste management unit
- Joint permitting
- Miscellaneous other issues (incinerator feed rate limitations)

Summary of Petition:

Chevron is petitioning for review of the corrective action permit issued to its Philadelphia refinery by Region 3. Chevron argues that this portion of the permit exceeds the scope of EPA's authority under RCRA Section 3004(u) in two ways. First, the permit includes a definition of solid waste management units (SWMUs) that is overly broad. Second, the permit requires Chevron to initiate the corrective action process at property not contiguous with the Chevron facility. In addition, Chevron takes issue with the feed limitations imposed by the permit on its hazardous waste incinerator.

- **RFI Conditions are not Justified.** Chevron petitions for review of the determination that Areas A and B Ballfields are subject to corrective action. The petitioner argues that these properties are not contiguous with the refinery, but are separated by a road not owned by Chevron and over which Chevron exerts no control.

- **Definition of Solid Waste Management Unit.** Chevron argues that the permit defines SWMU so as to reach units or areas at which no solid waste management ever occurred, such as process wastewater pipes, process lines and sumps, and certain loading and unloading areas.

- **Incinerator Waste Feed Limits.** Chevron contends that the Region applied overly conservative methodology to establish waste feed limits that address metals and hydrogen chloride emissions. The petitioner contends that these limits effectively shut down the incinerator. Chevron argues that it should be given time to conduct a trial burn to generate the data necessary to demonstrate that higher feed limits are appropriate.

- **Joint Permitting.** Chevron notes that the Region's decision on waste feed limits shut down an ongoing State permitted incinerator.

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

In the Matter of:	)	
Chevron USA Inc. Philadelphia Refinery	)	RCRA Appeal No. 89-26
RCRA Permit No. PAD 04 979 1098	)	

ORDER ON PETITION FOR REVIEW

Chevron USA Inc. has petitioned for review of a RCRA permit issued by Region III under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901-6992k, for Chevron's oil refinery in Philadelphia, PA. The permit imposes corrective action requirements under RCRA §3004(u) [1/] and incinerator feed rate limits under the omnibus authority in RCRA §3005(c)(3). [2/] As requested by the Agency's Chief Judicial Officer, Region III submitted a response to the Petition dated December 8, 1989 ("Region Response").

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly

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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 by the Administrator or a State 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 place in such unit.")

2/ 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.").

erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. See 40 CFR §124.19; 45 Fed. Reg. 33412 (May 19, 1980). The preamble to §124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." Id. The burden of demonstrating that review is warranted is thus on the Petitioner.

I. The Definition of "SWMU"

Corrective action under RCRA §3004(u) is limited to releases from solid waste management units ("SWMUs"). See 42 U.S.C.A. §6924(u). Chevron's permit defines "SWMU" as

> any discernible unit at a facility seeking a RCRA permit from which hazardous waste or hazardous constituents might migrate, irrespective of whether the unit was intended for the management of solid and/or hazardous waste.

Permit Condition I.E.4. Chevron argues that this definition improperly includes units that have nothing to do with solid waste management. It also contends that the Region improperly designated as SWMUs the facility's process wastewater pipes, loading and unloading areas, and process lines and sumps.

When imposing conditions for corrective action under RCRA §3004(u), a Region should use key jurisdictional terms like "SWMU" in a manner consistent with the statute and in a way that distinguishes the §3004(u) authority from other RCRA corrective

action authorities. [3/] The term "solid waste management unit" is not defined in the statute or in the rules, but the obvious import of these words is that a SWMU is a unit used for the management of solid waste. [4/] Under the statute, "solid waste" generally includes garbage, refuse, and other discarded material (with exceptions not applicable here). See 42 U.S.C.A. §6903(27). By defining "SWMU" to include any discernable unit -- regardless of whether it has any nexus to solid waste -- the permit at issue here improperly divorces the term from solid

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[3/] Although the Agency's remedial authority under RCRA §3004(u) is expressly limited to releases from SWMUs, other RCRA provisions confer authority to require cleanup of releases from non-SWMUs. RCRA §3008(h)(1), for example, authorizes the Agency to require corrective action for any release of hazardous waste (not just SWMU releases) from an interim status facility where necessary to protect human health or the environment. See 42 U.S.C.A. §6928(h)(1). A permit writer may use the omnibus authority in RCRA §3005(c)(3) to address a release from a non-SWMU at a permitted facility where necessary to protect human health and the environment. See 55 Fed. Reg. 30798, 30809 (July 27, 1990) (the Agency "intends to exercise its authority, as necessary, under the RCRA 'omnibus' provision (section 3005(c)(3)), or other authorities provided in RCRA * * * to correct such problems [not covered by RCRA §3004(u)] and to protect human health and the environment."); In re American Cyanamid Co., RCRA Appeal No. 88-22, at 2-3 (October 31, 1989) (omnibus provision authorizes corrective action for a release from a non-SWMU at a permitted facility where necessary to protect human health and the environment); In re Amerada Hess Corp., RCRA Appeal No. 88-10, at 3 (August 15, 1989) (omnibus authority "provides a sufficient legal predicate for requiring soil sampling for a suspected release from a non-SWMU"). The Agency may also require cleanup of a non-SWMU release of hazardous waste through an enforcement action for illegal disposal. See 50 Fed. Reg. 28702, 28712-13 (July 15, 1985).

[4/] See In re Shell Oil Co., RCRA Appeal No. 88-48, at 4 (March 12, 1990).

waste management, and therefore conflicts with the plain and natural meaning of that term as used in the statute. [5/]

Region III attempts to defend the permit definition by relying on the 1985 preamble to 40 CFR §264.101, the rule that currently implements RCRA §3004(u). This preamble states:

> The term "solid waste management unit" includes any unit at the facility "from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes." H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983).

50 Fed. Reg. at 28712. If viewed in isolation, the phrase "any unit" could be misread to include units that have nothing to do with solid waste. The overall context, however, undermines any such reading, for the very next sentence of the preamble states that RCRA §3004(u) "is generally not intended to encompass areas where wastes were not placed in such units." Id. The preamble, when viewed in its entirety, is consistent with the natural reading of Section 3004(u), which on its face is limited to units used to manage solid waste. [6/]

[5/] The definition of "SWMU" in the recently proposed Subpart S corrective action rule is limited to units "at which solid wastes have been placed at any time * * *." See 55 Fed. Reg. at 30874 (§264.501). The "SWMU" definition in the RCRA model permit is similarly limited to units at which solid waste has been placed. See Model RCRA Permit For Hazardous Waste Management Facilities, at Module XII(B), Condition 2 (EPA Office of Solid Waste, Draft September 1988).

[6/] The statement in the 1985 preamble quoted above in turn quotes from the House Report, which states in relevant part:

> [T]he term "solid waste management unit" is used to reaffirm the Administrator's

(continued...)

The Region also argues that Congress delegated authority to the Agency to further define the term "unit" as necessary to implement the goals of the statute. See Region Response at 2 (citing 50 Fed. Reg. at 28712). Regardless of the meaning of the broader term "unit," however, on its face RCRA §3004(u) extends only to releases from solid waste management units. Accordingly, this proceeding will be remanded to the Region so that it may limit the permit definition of "SWMU" to units that have been or are being used for solid waste management. [7]

In addition to its generic challenge to the permit definition of "SWMU," Chevron objects to the Region's treatment of the refinery's process wastewater pipes as a SWMU (SWMU 63). These pipes are both aboveground and underground, and are used to convey solid waste between process areas, API separators, and a wastewater treatment system. See Fact Sheet at 12; RCRA Facility

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[6] (...continued)

> responsibility to examine all units at the facility from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous waste.

H.R. Rep. No. 198, supra, at 60. The reference to "all units" in the House Report could arguably be read to include product tanks and the like. In my view, however, this quote is better read as merely emphasizing that the owner/operator's subjective intent is irrelevant to a unit's status, i.e., that Section 3004(u) applies to a release from any unit in which solid waste management actually occurred, even if such management was unintended.

[7] A federal appeals court has likewise suggested that any attempt to apply RCRA §3004(u) to a non-SWMU production unit would exceed the proper scope of the authority conferred by this provision. See United Technologies Corp. v. EPA, 821 F.2d 714, 723 (D.C. Cir. 1987).

Assessment ("RFA") at IV-44. [8/] The statute defines "solid waste management" as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." 42 U.S.C.A. §6903(28). This definition is broad enough to encompass the function provided by Chevron's process wastewater pipes, and the permit's designation of these pipes as a SWMU is consistent with the Agency's reading of that term as use in RCRA §3004(u). [9/]

Chevron also objects to Region III's designation of the facility's loading and unloading areas as SWMUs (SWMUs 81-86). Region III has determined that these areas are subject to routine and systematic spills. [10/] The Agency interprets the term "SWMU"

[8/] Chevron asserts that these pipes do not manage solid waste because they are part of an oil recovery system, but it fails to show clear error in the Region's determination that the material in the system is nonetheless solid waste. See generally 53 Fed. Reg. 519 (January 8, 1988) (discussing the Agency's authority under RCRA to regulate secondary materials).

[9/] See 55 Fed. Reg. at 30809 (although there might be technical difficulties associated with investigating releases from a process sewer, there are "sound reasons" for considering a process sewer to be a SWMU); In re Texaco Refining and Marketing, Inc., RCRA Appeal No. 89-12, at 4 n.4 (November 6, 1990) (same); In re Shell Oil Co., RCRA Appeal No. 88-48 (March 12, 1990) (same). Although the Agency has invited comment on its treatment of process sewers as SWMUs in the Subpart S rulemaking proceeding, it will continue to consider process sewers to be SWMUs in the interim. See Texaco Refining, supra; Shell Oil, supra.

[10/] See Region Response at 10. The RCRA Facility Assessment for the Chevron refinery likewise states that "[s]ince there were multiple stains at each [loading and unloading] unit and since loading/unloading operations are by function repeated operations there is a high potential for systematic and routine spills from these operations." RFA at IV-57; see also Fact Sheet at 14.

as used in RCRA §3004(u) to include areas at which solid wastes have been released in a routine and systematic manner. See 55 Fed. Reg. at 30808-09. As stated in the preamble to the recently proposed Subpart S corrective action rule:

> Another example [of a SWMU] might be a loading/unloading area at a facility, where coupling and decoupling operations, or other practices result in a relatively small but steady amount of spillage or drippage, that, over time, results in highly contaminated soils.

Id. The permit's designation of the loading and unloading areas as SWMUs is thus consistent with the Agency's interpretation of "SWMU" and with Agency policy regarding corrective action.

The permit's treatment of Chevron's process lines and sumps (SWMU 100) raises a more difficult issue. Region III concedes that these units are used to manage product and raw material, not solid waste. See Region Response at 8. As noted above, a unit that has never been used to manage solid waste cannot be a SWMU. Although the RFA notes that the areas beneath these process lines and sumps are heavily stained, it is unclear from the submissions on appeal whether the releases are the result of routine and systematic activity, thereby rendering the contaminated area a SWMU. On remand, in addition to revising the definition of "SWMU," the Region should determine whether the contaminated area beneath the process lines and sumps is a SWMU and, if not (or if its status is unclear), whether the releases should be addressed under the Agency's omnibus authority or other RCRA authorities. See note 3, supra.

II. The Definition of "Facility"

RCRA §3004(u) requires a RCRA permit to impose corrective action requirements for any release from a SWMU at the "facility" seeking the permit. For purposes of corrective action, Chevron's permit defines "facility" as "all contiguous property under the control of the owner or operator at which the units subject to permitting are located * * *." See Permit Condition I.E.5. This definition conforms to the Agency's reading of "facility" as set forth in the July 1985 preamble to Section 264.101 of the rules. See 50 Fed. Reg. at 28712. [11/]

Chevron objects to Region III's application of the permit definition of "facility" to two ballfield areas, Area A (SWMU 96) and Area B (SWMU 97). The Area B Ballfields were formerly used for refinery waste disposal in four lagoons which are now covered by soil. Soil samples from both Areas A and B revealed elevated levels of contaminants. The ballfield areas are separated from the rest of the refinery by a roadway. Chevron argues that to be contiguous under the "facility" definition, properties must be in actual contact. See Petition at 4.

The Region's application of the "facility" definition to the ballfields is consistent with the Agency's reading of "facility" as used in RCRA §3004(u). Although land owned by a permittee that is separated from the permitted site by land owned by others is not part of the "facility," the Agency considers property

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[11/] This reading of "facility" was upheld in United Technologies Corp., 821 F.2d at 721-23.

separated from the permitted facility by a roadway to be contiguous to, and thus part of, the facility. See 55 Fed. Reg. at 30808; cf. 40 CFR §260.10 (definition of "on-site"). [12/]

Although both Area A and Area B are thus properly considered to be part of the facility, there is no assertion in the submissions on appeal that the Area A Ballfields were used for solid waste management (unlike the Area B ballfields, which contained four lagoons). On remand, the Region should determine whether the record supports a such a finding and, if not, whether this area should be addressed under other RCRA corrective action authorities.

III. The Incinerator Feed Rate Limits

In Part III of the permit, Region III exercised the omnibus authority in RCRA §3005(c)(3) to impose waste feed rate limits to control metal and hydrogen chloride ("HCl") emissions from Chevron's hazardous waste incinerator. [13/] The limits are "Tier I

[12/] Chevron also asserts that the inclusion of Areas A and B as part of its facility conflicts with the dictionary definition of "facility," but it fails to explain why the mere presence of an intervening road between two adjacent parcels necessarily creates two separate "facilities" as that term is generally used and understood. Although the Agency has invited comment on its reading of the term "facility" in the Subpart S rulemaking proceeding (see 55 Fed. Reg. at 30808), it will continue to apply this reading of "facility" in permit proceedings conducted prior to the final issuance of Subpart S.

[13/] For a discussion of the use of the omnibus provision to control emissions from incinerators, see 55 Fed. Reg. 17862, 17889 (April 27, 1990); In re Chemical Waste Management, Inc., RCRA Appeal No. 87-12, at 3-5 (May 27, 1988); Memorandum from S. Lowrance, EPA Office of Solid Waste, to Hazardous Waste Division Directors, Regions I-X, re Use of Omnibus Authority to Control Emissions of Metals, HCl, and PICs from Hazardous Waste Incinerators (February 27, 1989).

limits" based on the conservative assumption that all hazardous constituents in the waste feed will be emitted, with no removal by existing pollution control devices or partitioning to the incinerator ash. [14/] The Region used these assumptions because Chevron's trial burn did not generate removal efficiency data for metals and HCl. (At the time of Chevron's trial burn, EPA had not yet begun to impose limits for metal and HCl emissions from hazardous waste incinerators.)

In its comments on the draft permit, Chevron proposed to conduct another trial burn by September 30, 1990, to generate removal efficiency data for metals and HCl, which could form the basis for less stringent, but adequately protective emission limits. [15/] In its October 1989 petition, Chevron likewise requests that it be allowed to operate under interim status for a period not to exceed one year, during which time it would conduct a new burn on "an expedited basis." See Petition at 5-6. The Region is willing to modify the limits if new trial burn data demonstrate that relaxed limits would adequately protect human health and the environment. See Fact Sheet, Part III.

This appeal has now been pending for more than one year, and Chevron has had sufficient time to carry out its intention to design and conduct an expedited trial burn by September 30, 1990.

[14/] See generally Guidance on Metals and Hydrogen Chloride Controls for Hazardous Waste Incinerators (U.S. EPA Office of Solid Waste, August 1989).

[15/] See Letter from G. Moffitt, Chevron USA Inc., to L. Carlson, EPA Region III, at 7-8 (September 15, 1989).

There has been no subsequent indication on appeal, however, that it has in fact done so. If Chevron has not yet submitted burn data for metals and HCl and if Region III determines on remand that Chevron will not do so in the near future, the Region should enforce the Tier I limits as they currently appear in the permit. If Chevron has completed a new trial burn, and if the results justify a modification of the feed rate limits, the Region should revise the permit accordingly. If Region III determines that Chevron will submit trial burn data on metals and HCl in the near future, the Region should consider replacing the permit's Tier I feed rate limits with conservative, interim emission limits based on estimated partitioning and removal efficiencies from pollution control equipment similar to Chevron's. [16/]

For the foregoing reasons, this case is remanded to the Region for proceedings consistent with today's order. [17/] Permit Conditions that are subject to revision or reconsideration on remand and any non-severable conditions (to be determined by the

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[16/] See Guidance, supra note 14, at Tab D-1 to D-2 & Tables III-8 & III-9. It is unclear from the submissions on appeal whether the Region's assumption of zero removal efficiency is based solely on the absence of trial burn data for metals and HCL or, on the other hand, whether it is also based on other relevant considerations such as the quality of the incinerator's pollution control equipment. If it is based exclusively on lack of data, and if Chevron plans to submit such data in the near future, on remand Region III should consider imposing conservative, interim emission limits in accordance with the Metals/HCL Guidance.

[17/] Although the rules contemplate that a grant of review will ordinarily result in additional briefing (see 40 CFR §124.19), further submissions would not aid in the disposition of the issues raised by the Petition. Accordingly, a direct remand to the Region is appropriate.

Regional Administrator) shall remain stayed on remand. The Region shall give public notice of this decision under 40 CFR §§124.10 and 124.19(c). Appeal of the remand decision is not required to exhaust administrative remedies under §124.19(f)(1)(iii).

So ordered.

Dated: 12-31-90

William K. Reilly
Administrator

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order On Petition for Review in the matter of Chevron USA Inc., RCRA Appeal No. 89-26, were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid:

Steven H. Roth
Chevron Corporation
555 Market Street
P. O. Box 7141
San Francisco, CA 94120-7141

Stephen R. Wassersug, Director
Hazardous Waste Management Division
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107

Mary B. Coe
Office of Regional Counsel
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107

Dated: JAN - 3 1991

Brenda H. Selden
Legal Staff Assistant