



## *RCRA Permit Appeal Fact Sheet*

**1988**

**FACILITY:** Shell Oil Company (Shell Oil)  
Anacortes, Washington  
WAD 009 275 082  
RCRA Appeal No. 88-48

**PETITIONER:** Shell Oil

**PETITION FILED:** December 27, 1988

**STATUS OF PETITION:** See Permit Appeal Status Report

**ISSUE:** RFI conditions are not justified

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### **Summary of Petition:**

Shell Oil is petitioning for a review of certain corrective action provisions in its Anacortes Refinery land treatment permit. Shell Oil maintains that the "Oily Sewer" is not a solid waste management unit, and, consequently, is not subject to a RFI. Furthermore, the petitioner contends that results of the RCRA facility assessment do not provide sufficient evidence of past release(s) to justify an RFI.

T. J. M. ul

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

In the Matter of:

Shell Oil Company

RCRA Permit No. WAD 009 275 082

RCRA Appeal No. 88-48

**ORDER DENYING REVIEW**

By Petition dated December 23, 1988, Shell Oil Company seeks review of the federal portion of a RCRA permit jointly issued by Region X and the Washington Department of Ecology for Shell's refinery in Anacortes, Washington. Based on the results of the RCRA Facility Assessment ("RFA"), the permit establishes corrective action requirements for eighteen solid waste management units at the refinery. As requested by the Agency's Chief Judicial Officer, Region X responded to the Petition on February 14, 1989 ("Region Response"). Shell was granted leave to submit a Reply, which it did on April 13, 1989.

Shell challenges two provisions (Permit Conditions VI.B.1 and .4) that require corrective action for the facility's "Oily Sewer." These conditions direct Shell to include the Oily Sewer as part of its RCRA Facility Investigation ("RFI") to determine whether the Sewer has leaked contaminants to soil and groundwater. The RFI work plan must set forth standards and criteria for soil gas probes, soil borings, and soil analysis along the sewer lines. The RFI results will then be used to

determine whether (and the extent to which) specific corrective action measures are necessary to protect human health and the environment.

Under the rules that govern this proceeding, there is no automatic administrative appeal from the Region's permit decision. Ordinarily, a RCRA permit determination will not be reviewed unless it is based on a clearly 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. 33,412 (May 19, 1980). The preamble to Section 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 on the petitioner.

Shell first notes that corrective action under RCRA §3004(u) is limited to releases from solid waste management units ("SWMUs"), <sup>1/</sup> and it argues that the Region wrongly concluded

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<sup>1/</sup> RCRA §3004(u) provides that permits 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.

42 U.S.C.A. §6924(u) (emphasis added). Although remediation under RCRA §3004(u) is limited to releases from SWMUs, other corrective action authorities are not so limited. See, e.g., RCRA §3008(h), 42 U.S.C.A. §6928(h) (Agency may require corrective action for a release of hazardous waste at an interim status facility where necessary to protect human health and the environment); 50 Fed. Reg. 28,712-13 (July 15, 1985) (Agency may  
(continued...))

that the Oily Sewer is a SWMU. As noted by Region X, however, Shell failed to preserve this issue for review. The rules require interested persons to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period [on the draft permit] \* \* \*." 40 CFR §124.13. A petition for review must show that "any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations \* \* \*." *Id.* §124.19(a). These rules help to ensure that the Region has an opportunity to address any concerns raised by the permit, thereby promoting the Agency's longstanding policy that most permit issues be resolved at the Regional level. See 45 Fed. Reg. 33,412 (May 19, 1980).

In this case, Shell's only comment on the corrective action portion of the permit was: "The RFA results do not provide sufficient evidence of past releases to justify an RFI." Letter from T. Moody, Shell Refinery Manager, to C. Sikorski, Region X, at 25 (October 28, 1988) (attached as Exh. 2 to Region Response). When viewed in the context of a draft permit that requires corrective action for eighteen SWMUs at the refinery, this vague, sweeping **assertion** is plainly insufficient to preserve for review

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<sup>1/</sup>(...continued)

address a release of hazardous waste from a non-SWMU through an enforcement action for illegal disposal); In re American Cyanamid Co., RCRA Appeal No. 88-22 (Oct. 31, 1989) (RCRA permit may require corrective action for a release from a non-SWMU under the RCRA omnibus provision where necessary to protect human health and the environment); In re Amerada Hess Corp., RCRA Appeal No. 88-10 (Aug. 15, 1989) (same).

the issue of the regulatory status of a specific unit (namely, the Oily Sewer). <sup>2/</sup>

Shell's argument also falls on the merits. The Oily Sewer consists primarily of underground, vitrified clay pipes used to collect wastewater from process areas, tank water draws, and other parts of the facility, as well as accidental spills in tank loading areas and precipitation run-off from a hazardous waste landfarm. Although neither the statute nor the rules define "SWMU", on its face the term plainly includes any unit used for the management of solid waste. I agree with Region X that Shell's Oily Sewer contains solid waste. <sup>3/</sup> 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 broad

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<sup>2/</sup> Shell also contends that this issue was raised and preserved through informal conversations between the facility's senior engineer and the Regional permit writer before and after the comment period. See Shell Reply at 4. The rules make clear, however, that to be preserved for review, an issue must be raised on the record during the comment period (§§124.13 and 124.19(a)), thereby giving the Region an opportunity to respond to the comment under §124.17(a). As noted in the preamble to §124.13, "the public comment on draft RCRA \* \* \* permits is the exclusive mechanism for gathering facts and arguments relating to such draft permits." 45 Fed. Reg. 33,411 (May 19, 1980).

<sup>3/</sup> Shell argues that the precipitation run-off and spills from its loading tank are not solid waste due to certain exemptions or exclusions set forth in 40 CFR §§261.3(a)(2)(iv)(D) and (c)(2)(i). See Shell Reply at 8. Even if Shell were to show that these provisions apply to the facts of this case (which it has not), §261.3 sets forth the definition of hazardous waste, not solid waste, and thus has no bearing on whether the Oily Sewer is a solid waste management unit.

definition embraces the carrying of solid waste to or among SWMUs by a sewer system. The word "unit" refers to any contiguous area of land on or in which waste is placed. See 47 Fed. Reg. 32,289 (July 26, 1982) (defining "waste management unit"). <sup>4/</sup> Because Shell's Oily Sewer meets each of the necessary elements of a SWMU, the Region properly treated it as a SWMU subject to corrective action under RCRA §3004(u). <sup>5/</sup>

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<sup>4/</sup> The legislative history to RCRA §3004(u) states that "[t]he term 'unit' is intended to be defined as in the preamble to EPA regulations published on July 26, 1982 and as further defined by EPA in the future." H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983). Shell argues that because the 1982 preamble and the rules do not list or specifically regulate "Oily Sewers," such sewers are not "units" and thus not SWMUs. See Shell Reply at 7.

I disagree for two reasons. First, the House Report is best read as referring to the 1982 preamble's definition of "waste management unit" (47 Fed. Reg. 32,289), which is broad enough to include the Oily Sewer, not to the preamble's mere listing of regulated units. Second, the House Report itself notes that the Agency may further define the term "unit" as necessary to implement the goals of the RCRA program. See H.R. Rep. No. 198, supra, at 60. Thus, nothing in the legislative history permanently confines "unit" to a fixed list of devices or regulatory categories.

<sup>5/</sup> The House Report states that, under RCRA §3004(u), the Agency should examine all units "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. Both the Region Response (p.8) and Shell's Reply (pp.3-5) suggest that the issue of whether a unit is a SWMU depends on whether hazardous constituents "might migrate" from the unit, i.e., on the unit's integrity. This is incorrect. Any unit used for solid waste management is a SWMU, regardless of its integrity. Issues of integrity come into play when evaluating whether a SWMU should be subject to investigation or remediation under RCRA §3004(u), not when deciding whether the unit is a SWMU in the first instance. The House Report is best read as simply emphasizing that the term "SWMU" embraces any unit in which solid waste management actually occurred, regardless of whether such management was intended.

Shell further argues that the RFA does not provide sufficient evidence of a release to justify further investigation of the Oily Sewer as part of the RFI. Portions of the sewer system were constructed as far back as 1955. See RFA at 25. The RFA concludes in relevant part:

Based on the age of most of the sewers, there is a high potential that leakage is occurring from the piping to soil and possibly groundwater.

Id. Shell argues that age is not an important factor in evaluating vitrified clay pipes; that there is little potential for leaks from the Oily Sewer due to its composition; that any leakage would be monitored by underground cameras; and that any release would pose little risk of migration due to the insolubility of the constituents of concern. See Shell Reply at 9-10.

These matters are precisely the kind of technical judgments that are best resolved at the Regional level. To require an owner/operator to conduct further investigation of a SWMU, the Region need not have conclusive evidence of a release, but instead only evidence of a likely or suspected release.<sup>6/</sup> The strength of the evidence will determine whether the permit should require a **full-scale** RFI to determine the extent of the release, or, on the other hand, verification monitoring with further investigation only if a release is confirmed. The record

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<sup>6/</sup> See, e.g., 52 Fed. Reg. 45,788-89 (Dec. 1, 1987) (a RCRA permit applicant may be required to conduct verification monitoring for all suspected releases where necessary to fill data gaps and to make an initial release determination).

supports Region X's concern about the Oily Sewer and its conclusion that further investigation is warranted. Shell's assertions to the contrary fail to show that the Region's decision in this regard is clearly erroneous or otherwise warrants review. <sup>1/</sup>

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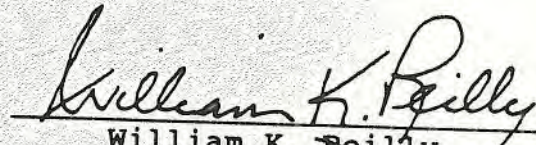
<sup>1/</sup> The RFA notes, inter alia, that the Oily Sewer is not subject to a sewer integrity testing program. Shell argues that the RCRA rules do not require any such program and that Region X has therefore improperly established a regulatory requirement without notice and comment. See Shell Reply at 5. The RFA, however, does not require testing, but merely relies on the absence of any testing program here as support for its conclusion that further investigation of the Oily Sewer is warranted.

Shell also contends that Region X should have conducted soil sampling during the RFA. I agree with the Region, however, that sampling for such an extensive unit was beyond the proper scope of the RFA sampling visit. See Region Response at 8-9 (citing RCRA Facility Assessment Guidance, at p. 4-1 (EPA OSW Oct. 1986)). In any event, the rules expressly authorize the Regions to require the facility to conduct verification monitoring where necessary to fill data gaps and to allow the Region to make an initial release determination. See 40 CFR §270.14(d)(3).

For the foregoing reasons and for those set forth in the Region Response, review is denied. <sup>8/</sup>

So ordered.

Dated: MAR 12 1990

  
William K. Reilly  
Administrator

<sup>8/</sup> Shell also alleges that the Region improperly excluded materials from the Administrative Record, namely two documents relating to a draft interim RFA report. See Shell Reply at 1-2. Shell has failed to show that it preserved this issue for review under 40 CFR §124.13. Moreover, this issue was raised before me for the first time in Shell's Reply, well after the thirty-day filing period under 40 CFR §124.19(a), and is thus untimely. Nothing in the Reply suggests that this matter was not "reasonably ascertainable" (§124.13) at the time of the public comment period, or that it could not have been raised in a timely fashion under §124.19 in the Petition. Indeed, Shell states that it became aware of the Region's decision to exclude the two documents from the record as early as March 1988 (see Shell Reply at 2), well before the public comment period in September 1988.

Aside from these fatal procedural deficiencies, Shell's Reply fails to show any departure from Agency regulations. The rules require that the draft permit be based on the administrative record, that the record be supplemented during the public comment period, and that it be completed when the final permit is issued. See 40 CFR §§124.9 and 124.18. Nothing in Shell's Reply, which consists of little more than unsupported assertions, shows that the Region deviated from these requirements.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Review in the matter of Shell Oil Company, RCRA Appeal No. 88-48, were sent by First Class Mail to the following persons:

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Dated:

MAR 13 1990



Brenda H. Selden, Secretary  
to the Chief Judicial Officer