RCRA Permit Appeal Fact Sheet **1989**

FACILITY: S.D. Warren Company (S.D. Warren)
Westbrook, Maine
MED 042 141 408
RCRA Appeal No. 89-35

PETITIONER: S.D. Warren

PETITION FILED: November 2, 1989

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:
- RFI conditions are not justified
- RFI conditions are technically inappropriate
- Other corrective action issues (media protection standards; corrective action beyond the facility boundary)

Summary of Petition:

The petitioner argues that EPA is insisting upon a remedial investigation that exceeds the Agency's RCRA corrective action authority and is unjustified by the results of the RCRA facility assessment (RFA). The petitioner also argues that EPA reached certain conclusions of law regarding the scope of EPA's corrective action authority under RCRA Sections 3004(u) and (v) with respect to surface water and air releases, which are clearly erroneous. The petitioner cites the impossibility of investigating air emissions from SWMUs at major industrial facilities and the inappropriate application of "background" as the cleanup standard. The petitioner argues that the rigid approach to RCRA corrective action as reflected in the S.D. Warren permit is inconsistent with EPA Headquarters' policy which seeks to streamline the process by avoiding unnecessary assessment, investigative and analytic burdens. S.D. Warren requests that the HSWA permit for its Westbrook facility be stayed in its entirety, pending disposition of this appeal, since it raises fundamental questions about the scope of S.D. Warren's potential corrective action obligation.

- **RFI Conditions are not Justified.** The petitioner argues that the scope of the investigation prescribed for each of nine solid waste management units (SWMUs) at Westbrook is excessive in light of available information about the nature of the waste at each SWMU. Specifically, S.D. Warren contends that there is scant empirical basis to assume that there have been or will be releases from several of the SWMUs to groundwater. Rather, S.D. Warren proposes to conduct further soil investigations at several SWMUs, thereby

implementing a "phased" approach to corrective action. The petitioner believes that EPA's own Interim Final RFI Guidance of May, 1989, calls for such a less burdensome phased approach in circumstances such as those found at Westbrook.

Under the phased approach, if hazardous constituents are detected during soil sampling and determined to be sufficiently concentrated and mobile so as to pose a threat to groundwater quality, S.D. Warren would then proceed to a groundwater investigation. The petitioner believes that Region 1's insistence on overbroad environmental investigation raises important policy questions regarding the amount of information collected during an RFA that is necessary to justify full scope environmental investigation.

- **RFI Conditions are Technically Inappropriate.** The petitioner contests the requirement to preform an investigation of possible releases of hazardous constituents to the air from its wastewater treatment facility. The investigation prescribes a comparison of downgradient air quality with air quality upgradient of the entire Westbrook plant. The petitioner argues that such an investigation is not feasible since any constituents that may be released to the air from the wastewater treatment plant may also be released in significant quantities through licensed emissions from industrial operations at the site. The petitioner maintains that its air release obligation should continue to be comprehensively addressed under the Clean Air Act.

- **Media Protection Standards.** The petitioner questions the Region's use of the alternate concentration limit (ACL) standards in 40 CFR Part 264.94 to establish "media protection standards." The petitioner maintains the following:

  - This provision is addressed exclusively to groundwater discharges from "regulated" units (i.e., land-based units actively managing hazardous waste after 1982);

  - EPA has not, as a matter of policy, made the general "background" standard of 40 CFR Part 264 Subpart F, applicable in assessing remedial obligations under RCRA corrective action;

  - The ACL procedure has no direct bearing on setting standards for protection of soil, air, and surface water, should such standard be necessary or justified; and

  - The Region's approach will require Warren to undertake an extensive risk assessment if its investigation detects any contamination of any medium above background. This runs counter to Headquarters' guidance, which would initiate a risk assessment after exceeding health/risk-based "action" levels.

The petitioner maintains that in the absence of final RCRA corrective action regulations, the Administrator should require Regions to conform generally to Headquarter's guidance. Otherwise the approach to corrective action will diverge widely by Regions, with resulting inequities among plants and companies as a function of where their facilities are located.

- **Corrective Action Beyond the Facility Boundary.** The petitioner argues that EPA's responses to S.D. Warren's concerns about an investigation of surface water and sediment beyond the facility boundary are "inadequate and fallacious." The petitioner maintains that EPA's corrective action authorities under RCRA do not empower the Agency to address releases from a waste water outfall beyond the plant's property boundary. The petitioner argues that RCRA Section 3004(v) is limited to groundwater releases from "regulated" units.

Jim Michaud

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

In the Matter of:	)	
S.D. Warren Company	)	RCRA Appeal No. 89-35
Permit No. MED 042141408	)	

ORDER ON PETITION FOR REVIEW

S.D. Warren Company seeks review of the federal portion of a RCRA permit issued by Region I for Warren's pulp and paper mill in Westbrook, Maine. The permit imposes corrective action requirements under RCRA §3004(u) [1/] for nine solid waste management units ("SWMUs") at the mill, as well as other terms and conditions under the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). [2/] As requested by the Agency's Chief Judicial Officer, Region I submitted a response to Warren's Petition for Review, which argues that review should be denied.

[1/] 42 U.S.C. §6924(u)(1988) ("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 placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.").

[2/] The balance of the RCRA permit was issued by the State of Maine, which is authorized under RCRA §3006 to administer its State hazardous waste program in lieu of the non-HSWA portion of the federal program.

Under the rules that govern this proceeding, there is no appeal as of right from a 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. 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 on the Petitioner. See 40 CFR §124.19.

Warren's Petition raises four issues regarding: (1) the scope of the corrective action investigation required by the permit for three SWMUs at the mill (designated as SWMUs 6, 7, and 8); (2) the legal authority for permit terms that require investigation of surface water and sediment in the Presumpscott River, which runs adjacent to the mill; (3) permit conditions that require the investigation of air releases from an aeration basin at the mill; and (4) the criteria specified in the permit for setting media protection standards. On issues 1 and 3, review is denied essentially for the reasons set forth in the Region's response to Warren's Petition. [3/] On issue 2, review is denied for the reasons set forth below. On issue 4, the

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[3/] Briefly put, Warren has failed to show that the Region abused its discretion or committed clear error in imposing groundwater monitoring requirements for SWMUs 6, 7, and 8 despite the absence of soil sampling data, or in concluding that air sampling for the aeration basin is both necessary and feasible.

proceeding is remanded for a more complete justification, or a revision, of the contested conditions.

Issue 2: Surface Water and Sediment Investigation

The permit requires Warren to sample surface water and sediment in the Presumpscott River, into which Warren discharges effluent from its wastewater treatment facility. The sampling will be used to determine whether further corrective action is warranted. Warren has been discharging wastewaters into the river since the 1870s. Until 1976, it discharged untreated wastewater, but since 1976 it has discharged treated effluent under a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. §1342. One concern raised by these discharges is dioxin contamination of the river.

Warren argues that the RCRA corrective action authority is inapplicable to releases that occur through an outfall that discharges beyond the facility boundary (in this case, into the Presumpscott River). There is nothing in the language of RCRA §3004(u), however, to suggest that such releases are beyond the scope of this authority. By its terms, RCRA §3004(u) extends to all releases of hazardous waste or constituents from any SWMU at the facility. The outfall in question is a SWMU (or at least part of a SWMU) at Warren's facility, even though the release itself flows from the outfall into the river.

Warren further notes that the statutory definition of "solid waste" excludes discharges subject to an NPDES permit, [4/] and it argues that such discharges are beyond the reach of the Agency's corrective action authority under RCRA §3004(u). The Region responds that this exclusion applies only to the wastewater discharge subject to an NPDES permit, not to constituents that settle out of a discharge and contaminate the surface water and river bottom. In its response to comments on the draft permit (p.12), the Region based this conclusion on an assertion by the Agency that sediment that settles out of wastewater is not exempt from the RCRA rules. See 45 Fed. Reg. 33098 (May 19, 1980). This citation is inapposite, however, because it concerns wastewater prior to being discharged under an NPDES permit, not material that settles out of wastewater after discharge. Id.

RCRA §3004(u) is not limited to releases of solid waste, but instead expressly extends to "all releases of hazardous * * * constituents" from any SWMU at a RCRA facility, language that is arguably broad enough to include an NPDES permitted discharge. 42 U.S.C. §6924(u). On the other hand, the Agency has made clear that RCRA §3004(u) will not be used routinely to reevaluate releases permitted under the NPDES program. See 55 Fed. Reg. 30808 (July 27, 1990); 45 Fed. Reg. 28714 (July 15, 1985). Here, however, much of the contamination of concern was caused by

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[4/] See RCRA §1004(27), 42 U.S.C. §6903(27)(1988) ("The term 'solid waste' * * * does not include * * * industrial discharges which are point sources subject to permits under section [402 of the Federal Water Pollution Control Act] * * *.").

releases that were not authorized by an NPDES permit. [5/] Accordingly, Warren has failed to show that the Region's decision to require investigation (and, if necessary, cleanup) of the Presumpscott River is based on clear legal error or constitutes an abuse of discretion which warrants review. [6/]

Issue 4: Media Protection Standards

Warren also challenges certain permit conditions that require it to propose Media Protection Standards after it completes its RCRA Facility Investigation ("RFI"). [7/] The

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[5/] In addition to the discharges that occurred prior to 1976, in 1986 Warren discharged several thousand gallons of untreated wastewater and limestone slurry into the river. Between 1986 and 1989, Warren also had repeated overflows, bypasses, and direct discharges of untreated wastewater. Additional surface water contamination has been caused by run-off and leaching from accumulated sludge near the aeration basin. See Region Response at 17 n.10, 18.

[6/] Warren also argues that it is inequitable to require it to investigate and clean up contamination caused in part by its NPDES discharges, while other paper mills that do not need a RCRA permit are not required to undertake such corrective action. Warren views this situation as particularly unfair given the Agency's ongoing review of dioxin effluent guidelines for paper mills. See Petition at 8. As noted above (note 5), however, the contamination of concern was not caused exclusively by Warren's NPDES discharges. Moreover, the corrective action provisions set forth in RCRA §3004(u) are mandatory, not discretionary, and the continuing review of dioxin discharge guidelines for paper mills should not be used to relieve Warren of these obligations.

The Agency's Office of Research and Development ("ORD") is reassessing the risks posed by dioxin. The Region should ensure that the corrective action process under the permit remains flexible enough to allow for revision of any dioxin cleanup standards imposed on Warren should revision be appropriate after ORD completes its reassessment.

[7/] An RFI is the second phase of the corrective action process. The first stage is the RCRA Facility Assessment ("RFA"), which is usually conducted by the Agency prior to the

(continued...)

phrase "Media Protection Standard" ("MPS") is a term of art used in the permit to designate a threshold that operates as both a trigger for the preparation of a Corrective Measures Study ("CMS") and as a cleanup level to be achieved by the ultimate corrective action remedies. [8/] Warren's basic objection is that these requirements are derived in large part from 40 CFR §264.94, which governs the establishment of concentration limits for hazardous waste management units (also referred to as "regulated units"). In Warren's view, use of the §264.94 framework is much less flexible than the approach called for by Agency guidance on cleanup of releases from solid waste management units under RCRA §3004(u).

Specifically, the permit directs Warren to propose MPSs in one of two ways: (1) by using background levels or (2) by specifying so-called alternate concentration limits ("ACLs"), which are contaminant concentration levels deemed by the Agency to be protective of human health and the environment for the

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[7/](...continued)
issuance of the permit. The RFA typically consists of a desk-top review of existing information on the facility, a visual site inspection, and in some cases a sampling visit. If the RFA reveals evidence of a likely or suspected release, the permit writer includes provisions in the permit that require the permittee to conduct an RFI, which serves to characterize the nature and extent of any release. If the RFI shows that cleanup of the release will likely be necessary to protect human health and the environment, the permittee is then required to conduct a Corrective Measures Study ("CMS") to identify appropriate remedial measures.

[8/] See Permit Condition VII (the MPSs "shall be used for measuring the necessity for and/or the degree of protection afforded by the corrective measures * * *.").

specific site at issue. If Warren proposes an ACL for soil, surface water, sediment, or air, the permit directs Warren to support the ACL with intake assumptions and exposure calculations. [9/] For groundwater ACLs, however, Warren must provide a written justification that fully analyzes nineteen factors specified in 40 CFR §264.94. [10/] For fourteen constituents, the permit provides that groundwater MPSs may also be based on maximum contaminant levels ("MCLs"), which are likewise listed in §264.94. [11/]

Warren argues that the Agency's 1989 guidance for cleanup of releases from SWMUs does not call for the use of §264.94 criteria to establish MPSs, but instead provides for risk-based action levels that serve to trigger a CMS. [12/] The Region responds that although the permit uses the §264.94 framework, it remains sufficiently flexible to allow for any legitimate risk-based standards that would be appropriate under the guidance.

For non-groundwater MPSs (i.e., those for soil, surface water, sediment, and air), I agree with the Region that the permit as written is flexible enough to accommodate the risk-

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[9/] See Permit Conditions VII.B.3, VII.C.3, VII.D.3.

[10/] See Permit Condition VII.A.3.

[11/] See Permit Condition VII.A.1.b. The Agency establishes MCLs under the Safe Drinking Water Act, 42 U.S.C. §300f et seq.

[12/] See RCRA Facility Investigation (RFI) Guidance, Vol. I -- Development of an RFI Work Plan and General Considerations for RCRA Facility Investigations, at chpt. 8 (OSWER Directive 9502.00-6D) (EPA Office of Solid Waste, Waste Management Division, Interim Final May 1989).

based approach set out in the 1989 guidance. Protection thresholds that could be used under that guidance may be proposed by Warren as ACLs under the permit. The showing required by the permit to justify non-groundwater ACLs is not so burdensome or unreasonable as to constitute an abuse of discretion by the Region.

The permit provisions for groundwater MPSs are another matter. As early as 1986, the Agency's Office of Solid Waste recognized that the §264.94 framework is not completely adequate for setting groundwater action levels and cleanup levels for SWMUs under RCRA §3004(u). [13/] In 1990 the Agency proposed a comprehensive set of rules for the implementation of RCRA §3004(u), the Subpart S proposal, which constitutes the Agency's most recent, comprehensive statement of policy regarding corrective action under RCRA §3004(u). See 55 Fed. Reg. 30798 (July 27, 1990). The proposal does not rely on the §264.94 framework, but instead incorporates the concept of risk-based "action levels" and cleanup levels. Id. at 30804-05, 30813-15. Contamination exceeding an action level creates a rebuttable presumption that a CMS is warranted. Id. Appendix A to the proposal provides a lengthy list of appropriate action levels for various constituents. The Subpart S proposal further expresses the Agency's intent to propose revisions to the rules that govern

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[13/] See National RCRA Corrective Action Strategy, at 14 (EPA OSWER, October 3, 1986) ("The Agency plans to issue guidance on ACLs during FY 1987. The Agency is currently assessing the appropriate technical approach to take to problems that cannot be addressed by existing standards.").

regulated units to make them consistent with the key features of Subpart S. See 55 Fed. Reg. 37053-54.

Because the Agency's approach to groundwater MPSs under RCRA §3004(u) has evolved beyond the §264.94 standards to a more sophisticated and flexible approach, it would be both imprudent and unfair to subject Warren to the former approach unless there is a specific and sufficient reason for doing so. [14/] Continued use of the §294.94 approach is not invalid per se, but the Region has failed to explain why the permit deviates from Agency-wide policy, as expressed in the 1989 guidance (and now in the Subpart S proposal), to follow a more flexible approach, i.e., one that allows for the use of risk-based action levels and cleanup levels for groundwater without requiring the nineteen-factor justification currently used for regulated units under §264.94.

Accordingly, this proceeding will be remanded to the Region. The Region should either demonstrate that the challenged permit terms are consistent with Agency policy on the establishment of action levels and cleanup standards for releases from SWMUs as expressed in the Subpart S proposal, or explain why a deviation

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[14/] This is not to suggest that a permittee may file a successful permit appeal every time the Agency solidifies a new policy after the issuance of its permit. In this case, however, the abandonment of the §264.94 standards in favor of a more flexible approach to action levels and cleanup levels is central to the Agency's current corrective action policies. Moreover, this development was underway at the time Warren's permit was issued. These factors weigh in favor of remanding the case to the Region to determine whether the permit should be altered to delete reliance on the §264.94 standards in favor of the Agency's current approach.

from this policy is appropriate in this case. Alternatively, if the Region determines that the permit should be revised to eliminate Warren's objections to the MPS provisions, it should propose appropriate revisions and subject them to public notice and comment.

Conclusion

This proceeding is remanded to the Region for additional proceedings consistent with today's order. The permit conditions subject to reconsideration on remand and any non-severable conditions (to be identified by the Region) shall remain stayed until completion of the remand proceedings. Appeal of the remand decision will not be required to exhaust administrative remedies under §124.19(f)(1)(iii) of the rules. On the other issues raised by the Petition, review is denied for the reasons set forth above and in the Region's response to the Petition (which reasons are hereby adopted and incorporated by reference as if fully set forth herein). [15/]

So ordered.

Dated: NOV 29 1991

William K. Reilly
Administrator

[15/] Although §124.19 of the rules contemplates that additional briefing typically will be submitted upon the grant of a Petition for Review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. See, e.g., In re Chemical Waste Management, Inc., RCRA Appeal No. 87-12, at 5 (May 27, 1988).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order on Petition for Review in the matter of S.D. Warren Company, RCRA Appeal No. 89-35, were sent to the following persons in the manner indicated:

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Dated: DEC 06 1991

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