



RCRA Permit Appeal Fact Sheet

1989

FACILITY: Owen Electric Steel Company of South Carolina (Owen Electric)
Cayce, South Carolina
SCD 003 353 760
RCRA Appeal No. 89-37

PETITIONER: Owen Electric

PETITION FILED: November 9, 1989

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- RFI conditions are too vague
- RFI conditions are not justified
- Definition of solid waste management unit
- Other corrective action issues (definition of corrective action; applicability of waste minimization to solid waste management units; reporting requirements)
- Procedural issues
- Joint permitting
- Miscellaneous other issues (applicability of land disposal restrictions)

Summary of Petition:

The petitioner requests a review of the final post-closure permit issued jointly to its steel mill in Cayce, South Carolina, by Region 4 and the South Carolina Department of Health and Environmental Control (DHEC). The petitioner contends that the issues raised in the petition involve findings of fact and conclusions of law that are clearly in conflict with the Agency's limited authority to impose permit conditions under Sections 3004(u) and 3005(h) of RCRA. The petitioner argues that the Agency exceeded its authority by imposing corrective action permit conditions unrelated to solid waste management units (SWMUs); imposing waste minimization requirements on closed units; and applying land disposal restrictions to closed units. In view of the fact that the petitioner is contesting integral portions of the permit, the petitioner requests that the effectiveness of the entire permit be stayed.

- **RFI Conditions are too Vague.** The petitioner contests the permit condition incorporating the duty to mitigate. The petitioner argues that this requirement is arbitrary and capricious, because it requires mitigation of any release without requiring that such release be linked to a discernible SWMU. The petitioner contends that although the permit condition is prefaced



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by the limiting phrase, "in the event of noncompliance with the permit," it is not clear that the release must somehow be related to a SWMU.

- **RFI Conditions are not Justified.** The petitioner believes that several SWMUs require no further corrective action. Owen Electric also contests provisions in the RFI Plan Outline.
 - The petitioner argues that the Agency has gone beyond that which was intended by Congress by developing the "guidance" contained in Appendix B to the permit as the RFI plan outline. The petitioner contests that the Agency has already acknowledged that the RFA report recommends actions less stringent than those set forth in Appendix B. The petitioner also argues that the requirements of Appendix B are overly broad, excessively extensive, and not necessary for each of the SWMUs at the facility.
 - The petitioner argues that the permit improperly characterizes SWMU 5 as a unit requiring an RFI. The petitioner contests that the RFI determination relies upon a report prepared by a contractor, which incorrectly concluded that roll-off containers are not covered during the electric arc furnace dust collection cycle. The petitioner contends that the dust generated in the baghouse dust collection area by each of the air pollution control devices is collected in hoppers that are covered during the collection cycle as well as during storage. The petitioner also contends that the hoppers are located on a concrete pad, and any spillage that occurs is swept up and placed back within the hopper. The petitioner contends that there is no known release from this unit, and believes that this system is adequate to protect against any releases from this SWMU. Consequently, the petitioner believes that there is no need for further investigation of this area.
 - The petitioner contends that the permit improperly characterizes SWMU 7 as a unit also requiring an RFI. The petitioner argues that SWMU 7, the slag fill area, does not pose a threat of a release to groundwater in excess of 40 CFR Part 264 Subpart F groundwater protection standards. The petitioner also points out that the RFA contractor report recommended no further action with respect to this SWMU.
 - The petitioner argues that the permit improperly characterizes SWMUs 8 and 9 as units requiring an RFI. The petitioner contends that the results of an EP toxicity analysis of these units detected no hazardous constituents. The petitioner states that these units are part of a permitted facility subject to an NPDES permit. The petitioner believes that there is not evidence to suggest any release or discharge of hazardous constituents into the environment from these units.



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- The petitioner argues that the permit improperly characterizes SWMU 15 as a unit requiring an RFI. The petitioner contends that SWMU 15, the contaminated soil storage area, is now contained within the cover area of the regulated hazardous waste unit at the facility. The petitioner also argues that no further investigation is warranted since: (1) the contaminated soil has been removed and disposed with the approval of DHEC; (2) no related contamination has been found in the ground water in wells hydraulically downgradient; and (3) the area is now covered by the clay dike, which is part of the permanent cap for the regulated unit.
- The petitioner argues that the permit improperly characterizes SWMUs A and C as units requiring RFIs. SWMU A, the oil leak area, is now contained within the parking area of the new office building at the facility. The petitioner states that this area was originally remedied to the satisfaction of DHEC, and consequently warrants no further investigation. The petitioner also contends that it can not locate SWMU C, the waste oil storage area. The petitioner contests that there are no photographs or descriptions to indicate the precise location of the unit and, therefore, it is impossible to assess the threat of a release from this unit. The petitioner believes that the Agency does not have evidence of a release from the unit.
- **Definition of Solid Waste Management Unit.** The petitioner objects to the permit condition that defines a "solid waste management unit" to include any unit which has been used for the treatment, storage, or disposal of "solid waste." The petitioner contends that the Agency has created a new definition by this permit condition and expanded its scope from that which was contemplated by Congress by eliminating the phrase "from which hazardous constituents might migrate." The petitioner believes that not limiting the units to those "from which hazardous constituents might migrate" clearly exceeds the statutory authority promulgated by the Agency. The petitioner also contests permit conditions that identify the slag processing area as a SWMU, arguing that slag is not a solid waste, for it is not a discarded material.
- **Definition of Corrective Action.** The petitioner argues that the Agency created a new definition of "corrective action" by permit condition, which clearly exceeds the statutory authority as well as the regulatory authority promulgated by the Agency. The petitioner believes the term "corrective action" is described in detail in 40 CFR Section 264.100 for regulated units and in 40 CFR Section 264.101 for SWMUs, and that those descriptions should be relied upon in the permit.
- **Applicability of Waste Minimization to Solid Waste Management Units.** The petitioner argues that RCRA does not require a waste minimization certification for all SWMUs at a permitted facility. The petitioner contends that the legislative history of RCRA Section



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3005(h) makes it clear that the certification requirement specified by Congress for permitted facilities is not to be applied retroactively to waste after that waste has been treated, stored or disposed. The petitioner believes, therefore, that the legislative history demonstrates a clear Congressional intent to eliminate the waste minimization certification at facilities no longer actively "managing" a hazardous waste. The petitioner also believes that the Agency can not require a certification for SWMUs that have been used only for nonhazardous solid waste. In addition, the petitioner contends that the permit's language with respect to the waste minimization requirements for SWMUs is vague, for it does not specify compliance time frames.

- **Reporting Requirements.** The petitioner protests permit conditions that require it to report any information concerning the release or discharge of any hazardous waste or hazardous constituents or of any fire or explosion at the facility which could threaten the environment or human health outside the facility or may endanger public drinking water supplies. The petitioner contends that the underlying regulatory authority for these permit conditions (40 CFR Sections 270.30(1)(6)(A) and (B)) do not include the requirement to include information concerning "hazardous constituents." The petitioner believes that the inclusion of hazardous constituents within the scope of these provisions clearly exceeds the regulatory authority promulgated by the Agency itself.
- **Procedural Issues.** The petitioner argues that in several instances it was not provided the opportunity to comment on additional language added by the Region to the draft permit.
 - The petitioner contests that in Condition I.D.5. requiring the petitioner to take all reasonable steps to minimize "releases of hazardous waste or hazardous constituents to the environment," the Agency added language to the draft permit, which was not the subject of any comments, nor was any explanation afforded by the Agency for the addition.
 - The petitioner argues that the Agency added additional language when defining "corrective action" in permit Condition I.G.7.
 - The petitioner contends that the Agency added additional language to Paragraph II.C.4 as it appeared in the draft permit, which was not the subject of any comments. The petitioner argues that the Agency added the term "subsurface gases" at two separate places in the permit.
- **Joint Permitting.** The petitioner argues that the permit improperly characterizes SWMUs 1, 2, 3, and 4, as units requiring an RFI. The petitioner contends that these SWMUs are permitted by DHEC as air pollution control devices and that DHEC has already required the



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petitioner to undertake a major investigation as to the integrity and operation of these devices. The petitioner believes that the investigation will likely include the complete replacement of the devices. The petitioner also contends that the DHEC investigation is consistent with the integration provision of Section 1006 of RCRA, and any discharge from these units should be addressed by DHEC air quality control permit.

- **Applicability of Land Disposal Restrictions.** The petitioner contends that land disposal restrictions do not apply to the hazardous waste disposal unit covered in the Federal permit, a closed hazardous waste pile. The petitioner argues that according to the Agency's own guidance, the land disposal restrictions in 40 CFR Part 268 do not apply to waste from closed units that are retained on-site after removal prior to November 7, 1986. The petitioner states that in the case of the non-operating waste pile, all visible hazardous waste has been removed from the site, and the facility is in the process of closing the remaining contaminated subsoils as a landfill.

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

In the Matter of:

Owen Electric Steel Company of
South Carolina

Permit No. SCD 003 353 760

RCRA Appeal No. 89-37

ORDER ON PETITION FOR REVIEW

By Petition filed under 40 CFR §124.19, Owen Electric Steel Company of South Carolina requests review of the federal portion of a permit issued by Region IV under Section 3005 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6925 (1988). The permit is for Owen's steel mill in Cayce, South Carolina. The mill contains a melt shop that uses electric arc furnaces for the production of molten steel, which is then cast into reinforcing bars, angles, and bar shapes for the construction industry. Waste units at the mill include a waste pile for electric furnace dust ("EFD," a K061 hazardous waste), slag piles, scrap metal storage areas, a cooling pond, and a settling pond.

The permit at issue is a post-closure permit for the EFD waste pile. The federal portion of the permit establishes land disposal restrictions, waste minimization provisions, and corrective action requirements under the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). The balance of the permit was issued by the State of South Carolina, which is authorized under

RCRA §3006 to administer its State hazardous waste program in lieu of the non-HSWA portion of the federal program.

Owen's Petition raises fifteen issues regarding the following permit terms: the land disposal restrictions; the waste minimization certification provision; the duty to mitigate certain releases; the duty to report certain releases; the definitions of "solid waste management unit" ("SWMU") and "corrective action"; the use of an Outline (Appendix B to the Permit) as a basis for the RCRA Facility Investigation ("RFI"); the designation of the Slag Processing Area as a SWMU; and the designation of certain units as requiring further investigation during the RFI. As requested by the Agency's Chief Judicial Officer, Region IV submitted a Response to the Petition, which argues that review should be denied.

Under the rules that govern this proceeding, a RCRA permit determination ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or unless it 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.

In my view, the Region has adequately explained the legal and factual basis for most of the contested permit conditions.

Certain contentions raised by Owen do not reflect any substantial disagreement, but instead result from a misreading of the permit or simply constitute an effort to confirm a reading of the permit that flows directly from the permit itself and the applicable regulations. ^{1/} For other issues, Owen's objection is so

^{1/} For instance, Owen objects to the inclusion of land disposal restrictions in the permit, arguing that these requirements are inapplicable to its EFD waste pile. See Petition at 5-6. The Region agrees that these restrictions do not apply to waste disposed of prior to the effective date of the restrictions, but it explains that these conditions are included in the permit because they apply to any hazardous waste removed as part of the corrective action required under the permit. See Region Response at 5-6.

Owen also argues that the RFI Plan Outline, attached as Appendix B to the permit, is overbroad and should be used as "guidance only." Petition at 15-16. The Outline itself, however, states that it is to be used as "guidance" (Appendix B at 1), and the permit (Condition II.C.4) makes clear that deviations from the Outline are permitted upon acceptable written justification. The Region's response to comments on the draft permit (p.4) and its Response to the Petition (pp.10-11) confirm that the Outline is to be used as mere guidance.

Owen reads Condition I.D.5 as requiring mitigation of any release regardless of origin, and it argues that this term goes beyond the Agency's corrective action authority under RCRA §3004(u), which is limited to releases from SWMUs. See Petition at 9-12. In response, Region IV points out that Condition I.D.5 by its terms is triggered only "[i]n the event of noncompliance with the permit." The Region interprets this language as limiting the requirement to releases resulting from noncompliance with the permit (as opposed to releases associated with activities outside the scope of the permit). See Region Response at 7. This interpretation, which flows directly from the language of the permit and is hereby deemed to be authoritative and binding, eliminates Owen's concern regarding the potential application of the requirement to any release regardless of the source. As interpreted, this permit condition is reasonable and within the Agency's statutory and regulatory authority.

conclusory as to preclude any kind of meaningful review. ^{2/}

Four issues, however, warrant additional discussion. ^{3/}

Duty to Report: Owen challenges Permit Condition I.D.14 (a), which requires it to report information concerning the release of any "hazardous waste or hazardous constituents" which might endanger public drinking water supplies or threaten the environment or human health outside the facility. Owen objects to these conditions because similar requirements set forth in the rules (§§270.30(1)(6)(i)(A) and (B)) make no reference to hazardous constituents, but are instead limited to releases of hazardous waste. ^{4/} It contends that this permit condition

^{2/} For example, Owen objects to the permit's definition of the term "corrective action," arguing that it "exceeds the statutory authority as well as the regulatory authority promulgated by the Agency itself," and it states that the definition should be based on §264.101 of the rules. Petition at 14. Section 264.101 does not define the term "corrective action," however, and it is unclear precisely what Owen finds objectionable about the permit's definition. In any event, the Region's Response to the Petition (pp.9-10) establishes that the permit definition is reasonable and appropriate.

^{3/} Owen's request (Petition at 4) for leave to file a reply to the Region's response is hereby denied.

^{4/} See 40 CFR §§270.30(1)(6)(i)(A) and (B), which provide:

(6) Twenty-four hour reporting. (i) The permittee shall report any noncompliance which may endanger health or the environment orally within 24 hours from the time the permittee becomes aware of the circumstances, including:

(A) Information concerning release of any hazardous waste that may cause an endangerment to public drinking water supplies.

(B) Any information of a release or discharge of hazardous waste or of a fire or explosion from the

(continued...)

therefore exceeds the Agency's regulatory authority. The Region responds that another rule, §270.14(d)(2), requires a permit applicant to submit all information pertaining to any release of hazardous constituents from a SWMU,^{5/} and that the imposition of similar requirements on a permittee is therefore appropriate.

Owen is correct that §§270.30(1)(6)(i)(A) and (B) do not refer to releases of hazardous constituents, but it must be remembered that these provisions were originally promulgated prior to the enactment of HSWA. See 45 Fed. Reg. 33435-36 (May 19, 1980) (§§122.28(d)(1) & (2)). At that time, the Agency's jurisdiction under Subtitle C of RCRA was essentially limited to hazardous waste. RCRA §3004(u), which was added by HSWA, extends the Agency's Subtitle C jurisdiction to include regulation of releases of hazardous constituents from SWMUs.^{6/}

^{4/} (...continued)

[hazardous waste management] facility, which could threaten the environment or human health outside the facility.

^{5/} See 40 CFR §270.14(d)(2) ("The owner or operator of any facility containing one or more solid waste management units must submit all available information pertaining to any release of hazardous waste or hazardous constituents from such unit or units.").

^{6/} RCRA §3004(u), 42 U.S.C. §6924(u) (1988), provides:

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

(continued...)

Thus, the underlying legal authority for the contested portions of Condition I.D.14 is not §270.30(1), as Owen suggests, but RCRA §3004(u) and the rule that implements this provision, 40 CFR §264.101. These provisions essentially provide legal authority for any permit condition reasonably related to corrective action for releases from SWMUs. ^{1/}

The question then becomes whether the Region reasonably exercised this legal authority to impose a duty to report certain releases of hazardous constituents. In my view, it plainly has. The permit condition at issue is narrowly tailored to apply only to releases that might endanger public drinking water supplies or could threaten human health or the environment outside the facility. As noted by the Region, Section 270.14(d), which was also issued to implement RCRA §3004(u), codifies the Agency's policy of requiring permit applicants to submit information regarding releases of hazardous constituents from SWMUs so that

^{6/} (...continued)

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.

^{1/} Although the Agency has proposed a more comprehensive set of rules to implement RCRA §3004(u), see 55 Fed. Reg. 30798 (July 27, 1990), until that proposal is promulgated corrective action permit conditions issued under RCRA §3004(u) derive their regulatory authority from §264.101 of the rules.

It should be noted that there are other statutory and regulatory bases, besides RCRA §3004(u) and §264.101, for permit conditions that impose corrective action requirements, including the rules that govern releases from hazardous waste management units (§§264.90-.100) and the RCRA omnibus provisions (RCRA §3005(c)(3) and §270.32(b)(2) of the rules).

the permit writer can establish corrective action permit requirements where necessary to protect human health and the environment. It is entirely reasonable to impose similar requirements upon a permittee -- particularly where (as here) the duty is limited to releases that might give rise to a genuine risk -- so that the Region may evaluate the risk and, if necessary, modify the permit or take other appropriate action to address the release. ^{8/}

The Slag Processing Area: This unit is a four-acre area where slag is dumped and crushed for reuse offsite. The slag is placed on bare soil with no release controls, and drainage is toward a nearby creek. The RCRA Facility Assessment states that although the potential for release to soil and groundwater of newly placed slag is low due to low leachability, the potential for release to these media from weathered slag is unknown because leachability data were not provided. See Interim RCRA Facility Assessment Report, at IV-3 (April 24, 1987) ("RFA"). The RFA also indicates that there is a high potential for air releases during slag crushing and handling operations. Id. It recommends

^{8/} Although §264.101 of the rules does not set forth detailed standards for corrective action, permit writers are not limited to repeating the statutory and regulatory language in the permit. Section 270.32(b)(1) of the rules authorizes permit writers either to incorporate the rules in Part 264 directly into the permit or to "establish other permit conditions that are based on these parts." Following the enactment of HSWA, the Agency has routinely chosen the latter approach to establish detailed permit requirements for corrective action. Although the Region does not cite any specific Agency guidance as support for the permit condition at issue, such terms will be sustained on appeal so long as they constitute a reasonable exercise of the Region's discretion.

that soil data on weathered slag be obtained to determine leachability, and that air sampling be conducted during slag processing operations. Id. at IV-3, V-3.

Owen argues that the slag is not solid waste, and that this unit is not a SWMU, because the slag is not "discarded" under the statutory and regulatory definitions of "solid waste." ^{9/} In its response to Owen's comments on the draft permit (p.5), the Region makes the blanket assertion that "recycle units are subject to 3004(u) corrective action authority." The suggestion that RCRA §3004(u) applies to all recycling units is, however, incorrect because not all recycling units are SWMUs. Some recycling units -- such as those that provide for continuous, immediate on-site recycling of certain materials -- do not manage solid waste and are thus not SWMUs. ^{10/}

^{9/} RCRA §1004(27) defines "solid waste" (with exceptions inapplicable here) as "any garbage, refuse, sludge * * * and other discarded material * * *." 42 U.S.C. §6903(27); see also 40 CFR §261.2.

^{10/} See American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) (materials destined for reuse in an ongoing, continuous manufacturing process are not discarded and thus are not solid waste under RCRA); 53 Fed. Reg. 519 (January 8, 1988) (same); cf. American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) (EPA correctly determined that sludges produced by wastewaters from primary smelting operations are discarded and thus solid waste under RCRA despite the possibility of future reclamation); American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990) (K061 sludge is "indisputably 'discarded'" and thus solid waste prior to reclamation and might be solid waste even after it reaches the reclamation facility); 56 Fed. Reg. 41164 (August 19, 1991) (K061 waste (electric arc furnace dust) destined for reclamation is a solid waste under RCRA).

The manner in which Owen's slag is handled evidently precludes any argument that the waste pile is not a SWMU.^{11/} This unit's regulatory status has been confused, however, by the Region's Response to the Petition, which asserts that the slag is solid waste under §261.2 because it is a listed hazardous waste (K061 sludge). See Region Response at 12. If this were the case, the unit would be a hazardous waste management unit ("HWMU"), not a SWMU. Yet nothing in the permit, the RFA, or the other materials before me suggests that the Region is regulating this unit (or any other slag-related unit at the site) as a HWMU.

This confusion makes it difficult to discern and evaluate the Region's rationale for characterizing the unit as a SWMU. I am therefore remanding this issue to Region IV for further consideration. The Region is directed to supplement its response to Owen's comments on the draft permit to provide a coherent and complete explanation as to why it considers the slag to be solid waste (and the unit to be a SWMU) under the applicable statutory and regulatory definitions of "solid waste" and the case law construing those definitions (see notes 10-11, supra).

The Slag Fill Area: Owen objects to the Region's inclusion of the Slag Fill Area as a unit to be investigated as part of the RFI. This unit is a one-acre landfill used for the disposal of electric furnace slag, cinders, and firebrick. It has been

^{11/} Cf. In re Lee Brass Co., RCRA (3008) Appeal No. 87-12, at 5-12 (EPA CJO August 1, 1989) (spent foundry sand that is stored in a waste pile, subjected to metals reclamation, and then reused is solid waste in view of the manner in which the sand is handled prior to reclamation).

inactive since 1978. Owen bases its objection on the RFA, which asserts that this unit has a low potential for release to soil and groundwater due to the nature of the waste. The RFA recommends no further action for this unit at this time.

The Region's complete response to Owen's comments on the draft permit regarding this issue is as follows:

While the EP toxicity tests show that the slag is not hazardous waste, the unit does contain hazardous constituents listed in Appendix VIII. This unit will remain listed as a SWMU requiring a RFI.

Response to Comments at 5. The Region's Response to the Petition is more specific as to what the Region expects in terms of corrective action for this unit, stating that annual sampling should be conducted to determine whether there is a release from the unit. See Region Response at 16. But like its response to comments, the Region's Response to the Petition simply asserts, without explanation, that annual sampling is warranted because "it is known that hazardous constituents have been placed in the unit." Id.

The mere presence of hazardous constituents in a land-based SWMU does not by itself justify an annual soil sampling requirement. The Agency does not require routine groundwater monitoring for all SWMUs (see 52 Fed. Reg. 45789), and it has never suggested that the presence of hazardous constituents in a SWMU warrants annual soil sampling. To the contrary, the Agency's Office of Solid Waste has stated that "sampling needs will differ on a case-by-case basis * * * depend[ing] on the

amount and quality of information gathered in the PR [preliminary review] and VSI [visual site inspection] * * *." RCRA Facility Assessment Guidance, at 1-5 (EPA OSW, October 1986). Although the Regions should never hesitate to require a permit applicant or permittee to conduct sampling where necessary to determine if a more complete investigation is warranted (see 40 CFR 270.14(d)(3)), such a finding of necessity should not be based on the presence of hazardous constituents standing alone. To require soil sampling of every land-based unit that contains hazardous constituents would be to disregard other site-specific conditions -- such as the amount and toxicity of the constituents, the unit's design, and the potential for exposure -- that must be factored into the analysis.

Although the Region notes that past sampling efforts have been "sporadic," it gives no explanation as to why annual sampling is necessary or appropriate to cure this deficiency. On remand, the Region should reconsider whether annual soil sampling for the slag landfill is necessary to protect human health and the environment, and if it concludes that such sampling is warranted, it should supplement its response to Owen's comments on the draft permit with a more comprehensive justification of this permit requirement based on the nature of the waste, potential for exposure, and other factors that bear upon the potential for a significant release from the unit.

The Oil Storage Area: The RFA (p. B-27) states that prior to 1984, there was no organized method of storing waste oil at

the site, and that State inspectors previously found an area where waste oil cans were tipped over and surrounded by water. Although this method of storage was discontinued when Owen installed an aboveground oil storage tank in 1984, the RFA nevertheless recommends that soil sampling be conducted to determine whether residual contamination exists. Id. at IV-7, V-4.

Owen does not object to this sampling requirement, but in its comments on the draft permit it stated that it was unable to locate the area of concern, which is described in the RFA (p. B-27) as being "[a]djacent to Electric Furnace roll-off Container." The Region's response to Owen's comments on the draft permit fails altogether to address this matter. In its Response to the Petition, the Region simply asserts that the description in the RFA is adequate to determine the location of this unit. See Region Response at 20.

There is no reason to believe that Owen is being untruthful or recalcitrant when it asserts that it needs more information from the Region to isolate the area of concern, especially in view of the rather imprecise nature of the location description in the RFA. Where, as here, a permittee is willing to undertake specified corrective action, the Region should exercise greater diligence in aiding the permittee to identify the area to be tested. If the precise boundaries of the area of concern are indeterminate because the oil storage barrels have long since been removed, the Region should work with the permittee to select

an area for soil sampling that will be reasonably broad enough to address the concern. The Region is directed to undertake such efforts on remand and to supplement its response to comments on the draft permit to address this issue. ^{12/}

^{12/} The Region's response should be clarified in three further respects. First, in discussing the definition of "SWMU", the Region notes that a 1987 memorandum from the Agency's Office of Solid Waste defines "SWMU" to include an area contaminated through routine and systematic releases. See Region Response at 9. The Region then asserts that the definition set forth in this memo does not include "the concept of release." Id. The very purpose of the memo, however, is to make clear that certain releases (i.e., those that are routine and systematic) may give rise to a SWMU. The Region's assertion in this regard is probably intended to suggest that if routine and systematic releases to an area give rise to a SWMU, the contaminated area is a SWMU regardless of whether the contaminants will be further released beyond the SWMU area.

Second, while the Region has demonstrated that it has sufficient legal authority to require a waste minimization certification under RCRA §3005(h)(1) for Owen's facility even though there are no active hazardous waste management units, it should be noted that Owen is correct in asserting that this provision should not be read to require retrofitting of existing units or the installation of new technology as it becomes available. See Petition at 8 (quoting S. Rep. No. 284, 98th Cong., 1st Sess. 66 (1983)).

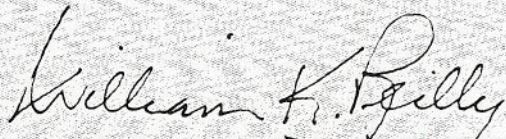
Third, the Region asserts that Owen's Petition was filed on November 9, 1989, and was therefore one day late. In fact, the Petition is stamped as having been received by the Region on November 8. Although a Petition for Review under §124.19 should be directed to the Administrator and timely filed with EPA Headquarters (not the Region), the Agency has the discretion to relax its procedural requirements where the public interest so requires, absent substantial prejudice to any party. See *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 537 (1970). Although the Agency generally requires strict compliance with the procedural requirements in §124.19, see *In re Georgetown Steel Corp.*, RCRA Appeal No. 91-1 (June 10, 1991), given the minor nature of Owen's deficiency and the importance of the matters being remanded by today's order, sufficiently compelling circumstances exist to disregard the deficiency.

Conclusion

This proceeding is remanded to the Region for additional proceedings consistent with today's order. ^{13/} The conditions that are the subject of the 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. For 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).

So ordered.

Dated: **FEB 28 1992**



William K. Reilly
Administrator

^{13/} Although §124.19 of the rules contemplates that additional briefing 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

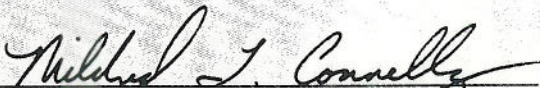
I hereby certify that copies of the foregoing Order on Petition for Review in the matter of Owen Electric Steel Company of South Carolina, RCRA Appeal No. 89-37, were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid:

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Dated: MAR 2 1992


Mildred T. Connelly, Secretary
to the Judicial Officer