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RCRA Permit Appeal Fact Sheet

1988

FACILITY: Navajo Refining Company (Navajo)
Artesia, New Mexico
NMD 048 918 817
RCRA Appeal No. 88-3

PETITIONER: Navajo

PETITION FILED: March 25, 1988

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- RFI conditions are too vague
- RFI conditions are not justified

Summary of Petition:

The petitioner is contesting issues relating to the corrective action section. These issues are outlined in greater detail below.

- **RFI Conditions are too Vague.** Navajo also believes that the scope of the RFI is too broad per permit conditions relating to release verification at the North Colony Container Storage Area. Specifically, Navajo contests the permit directive to collect analytical data identifying the location and sources of "suspected releases" associated with this storage area. Navajo argues that the findings of the RFA indicate that the container storage area was an unlikely source of hazardous waste or constituent release. The petitioner contends that the permit directive is unduly vague in failing to identify the nature of the "suspected release" and seems to conflict with the RFA report and Region 6's response to comments (Region 6 responded to comments on the storage unit by stating that the North Colony Container Storage Area "is conditionally removed from the full RFI work plan" provided Navajo verifies that no releases have occurred). Navajo requests that this condition be eliminated or appropriately reformed to be more specific.
- **RFI Conditions are not Justified.** The petitioner believes that the scope of the RFI is too broad, for it requires Navajo to perform an RFI and a Corrective Measures Study (CMS) at off-site wastewater treatment units identified as 3 Evaporation Ponds 1, 2, and 3, separated from the facility by both public and private lands. The ponds are connected with the facility by the 3 Mile Ditch, an old conveyance system for which Navajo has no continuous, established legal title. Navajo contests this condition on several grounds:



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- The ditch itself is not controlled by Navajo, as it is open to use by adjoining landowners and the public. Navajo argues, therefore, that it is "factually erroneous" for Region 6 to contend that the evaporation ponds are part of the permitted facility, subject to Section 3004(u) corrective action.
- Navajo contends that Section 3004(v) authority was intended only to deal with off-site contamination originating from on-site units. Navajo argues that any "release" of hazardous constituents would originate from the off-site units, and that any "discharge" from the refinery's on-site units to the wastewater treatment system would not in themselves constitute a "release."
- Finally, the petitioner contends that the 3 Mile Ditch and Evaporation Ponds have been actively regulated since 1974 by the New Mexico Oil Conservation Division, which directed a comprehensive groundwater and surface water impact analysis. Navajo argues that HSWA corrective action is "regulatorily redundant," and would potentially conflict with State-directed corrective action.

Navajo also contests the RFI requirement to submit a preliminary report apart from the RFI work plan. Navajo contends that all background information requested to be included in the preliminary report is already included in the Part A and B permit applications, as well as other extensive RCRA file materials such as the RCRA facility assessment (RFA) preliminary assessment report. Navajo argues that submittal of another preliminary report would impose burdensome information requests "which detract from limited manpower resources that could be more effectively concentrated on the RFI work plan itself."

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

In the Matter of:

Navajo Refining Company

RCRA Permit No. NMD 048918817

RCRA Appeal No. 88-3

ORDER DENYING REVIEW

By petition submitted under 40 CFR §124.19, Navajo Refining Company seeks review of a RCRA permit issued by Region VI for Navajo's oil refinery in Artesia, New Mexico. The Petition challenges certain permit conditions that require corrective action under RCRA §3004(u) for a drainage ditch and three evaporation ponds. Navajo has used these units since the 1930s to manage wastewater from its refining operations. The ditch runs across land not owned by Navajo. With the owners' permission, Navajo has used the ditch to transport substantial amounts of wastewater and drainage on a daily basis from the rest of the facility to the evaporation ponds. The ponds cover about eighty acres and are located on property owned by Navajo about three miles from the rest of the refinery. Navajo argues that the ditch and ponds are not part of its "facility" and therefore not subject to corrective action under RCRA §3004(u), which by its terms applies only to releases from units "at a * * * facility seeking a permit" under Subchapter III of RCRA. 42 U.S.C.A. §6924(u) (West Supp. 1988).

The word "facility" is not defined in RCRA. As one might expect with such a general term, its precise meaning is not uniform throughout the statute but instead depends upon the context in which it is used. See Mobile Oil Corp. v. EPA, 29 Env't. Rep. Cas. (BNA) 1385, 1387 (D.C. Cir. April 4, 1989). As used in Section 3004(u), "facility" encompasses the broadest possible extent of the Agency's area jurisdiction under Section 3004. See 50 Fed. Reg. 28,712 (July 15, 1985). As interpreted by the Agency, "facility" in RCRA §3004(u)

is not limited to those portions of the owner's property at which units for the management of solid or hazardous waste are located, but rather extends to all contiguous property under the owner or operator's control.

Id. (emphasis added); see also United Technologies Corp. v. EPA, 821 F.2d 714 (D.C. Cir. 1987) (upholding Agency's reading of "facility" as used in RCRA §3004(u)).

Applying this interpretation, Navajo argues that the ditch is outside of its control because it does not own the ditch and has no right to exclude others from using this property. It contends that the ponds are not contiguous to its refinery because they are three miles away and separated from it by land owned by others. The Region contends that Navajo controls the ditch because Navajo has used it to transport wastewater for more than fifty years. It views the ponds as contiguous to, and thus a part of, the facility because they are physically connected to the rest of the refinery by the ditch.

It is beyond cavil that the ditch is contiguous to the rest of the refinery, that the ponds are contiguous to the ditch, and that Navajo owns and controls the ponds. The issue reduces to whether Navajo exercises sufficient control over the ditch; if so, then the ditch and the adjoining ponds are contiguous land under its control and thus part of its "facility" under RCRA §3004(u).

Application of the contiguity and control criteria to define the scope of a facility under RCRA §3004(u) should be guided by the meaning of the word "facility" itself, which the criteria merely serve to explicate. "Facility" is an expansive term which generally denotes anything built, installed, or established to serve a particular purpose.^{1/} Region VI found adequate control here by focusing on Navajo's longstanding ability to use the ditch as part of its overall refining operations, specifically, to transport the refinery's wastewater to its evaporation ponds. This functional and temporal application of the control criterion is entirely consistent with the meaning of "facility." Navajo's use and control of the ditch is integrally related to the overall purpose of its refinery, and it does no violence to the statutory language to consider the ditch (and adjoining ponds) part of that facility for purposes of RCRA §3004(u). Indeed, the record shows

^{1/} See Webster's Ninth New Collegiate Dictionary, at 444 (1986) (definition 4b of "facility"); Black's Law Dictionary, at 531 (1979); cf. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 860 (1984) ("The ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose.")

that Navajo itself has described the ponds as units "at [its] facility." ^{2/}

Navajo does not assert, and the record before me fails to show, that Navajo's lack of legal title to the ditch will impede its efforts to remediate any releases caused by its use of the ditch. Given the narrowness of the ditch, it might become necessary to undertake corrective action beyond the precise boundaries of the facility (i.e. the ditch, the ponds, and the rest of the refinery) if on-site action is inadequate to protect human health and the environment. RCRA §3004(v) authorizes such off-site action unless Navajo, despite its best efforts, is unable to obtain the necessary permission to undertake such action. See 42 U.S.C.A. §6924(v). Requiring Navajo to address any release from the ditch, however, is no different from requiring corrective action by other non-owner operators, the propriety of which is undisputed.

If, on the other hand, the scope of a "facility" were coterminous with the right to exclude (as Navajo contends), a permittee could easily circumvent RCRA §3004(u) by deliberately arranging to manage its solid waste on contiguous land owned and shared by others. This reading would undermine the broad

^{2/} Response to Early Enactment Provisions of the Hazardous and Solid Waste Amendments of 1984, at Attachment 2 ("Information Regarding Potential Releases from Solid Waste Management Units"), Questions 1 & 2 and responses (Attachment 18 to Region VI's July 15, 1988 Response to Navajo's Petition); see also Letter from Navajo to Region VI, item 2 (March 27, 1986) (Attachment 9 to Region VI's Response to Navajo's Petition) (describing ditch and ponds as "units at the refinery").

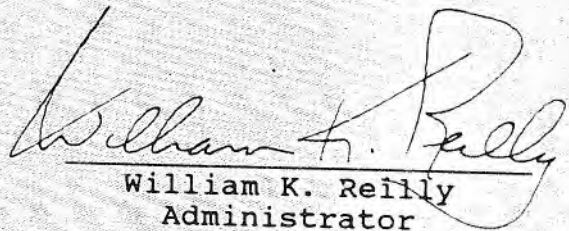
remedial purpose of RCRA §3004(u), is inconsistent with the expansive meaning of "facility," and is therefore rejected. ^{3/}

Conclusion

For the reasons set forth above and based on the record before me, Navajo's petition for review is denied.

So ordered.

Dated: JUN 27 1989


William K. Reilly
Administrator

^{3/} Navajo further argues that application of RCRA §3004(u) to the ditch and ponds is "regulatorily redundant" because this land is already regulated by the New Mexico Oil Conservation Division. Petition at 3-4. As Region VI has stated, however, inclusion of this property in the facility permit is necessary to ensure that corrective action for these units is consistent with the demands of RCRA §3004(u). See Response to Comments at 2, Response 5 (attached to Navajo's Petition).

Navajo's Petition raises two other issues, but these have been resolved by the parties through settlement negotiations.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Navajo Refining Company, RCRA Appeal No. 88-3, were sent to the following in the manner indicated:

By First Class Mail,
Postage Prepaid:

Robert E. Morse, III
CRAIN, CATON, & JAMES
Attorneys and Counselors
3300 Two Houston Center
Houston, Texas 77010-1079

Renee Holmes
Office of Regional Counsel
U.S. EPA, Region VI
1445 Ross Avenue
Dallas, TX 75202

Allyn M. Davis, Director
Hazardous Waste Management
Division
U.S. EPA, Region VI
1445 Ross Avenue
Dallas, TX 75202

Dated: JUN 28 1989


Brenda H. Selden, Secretary
to the Chief Judicial Officer