

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

G.A.S.P., SIERRA CLUB, OREGON
WILDLIFE FEDERATION, KARYN JONES,
SUSAN JONES, HEATHER BILLY,
DEBORAH BURNS, JANICE H. LOHMAN,
LEANDRA PHILLIPS, MERLE C. JONES,
CINDY BEATTY, ANDREA E. STINE,
DOROTHY IRISH, MARY BLOOM,
ROBERT J. PALZER, JANET NAGY,
LaDONNA KING, JOHN SPOMER,
CHRISTINE CLARK, STUART DICK, GAIL
HORNING, DAVID BURNS, PIUS A.
HORNING, KARLA STUCK, and MELANIE
BELTANE,

Petitioners

vs.

ENVIRONMENTAL QUALITY
COMMISSION of the STATE OF OREGON,
and DEPARTMENT OF ENVIRONMENTAL
QUALITY of the STATE OF OREGON,

Respondents,

UNITED STATES ARMY, and
WASHINGTON DEMILITARIZATION
COMPANY,

Intervenors.

Case No. 0009 09349

**OPINION AND ORDER
ON JUDICIAL REVIEW**

GASP III

1

Summary

2

Under applicable law, this court has no power to grant relief unless the record viewed as a

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whole compels the conclusion that no reasonable agency would fail to revoke or modify the permit

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for operation of the Umatilla Chemical Agent Disposal Facility. That permit allows incineration of

1 a stockpile of weapons of mass destruction consisting of many tons of deadly chemical warfare
2 weapons and munitions. I have some concerns that recent appellate interpretations of statutes
3 regulating judicial review of agency orders may undermine both the application of agency expertise
4 and legislative control of agency conduct, but I am bound to apply those interpretation. Under
5 applicable law and my view of the evidence, except in one respect I must reject Petitioners'
6 contentions.

7 The Petitioners have adduced substantial evidence that *could* support a finding that the
8 Respondents have failed to consider health risks to certain sensitive segments of the population;
9 failed to insist on quantification and control of all of the hazardous emissions the facility will
10 generate; failed to account for hazardous emissions in combination with existing accumulations of
11 toxic chemicals and compounds in our environment and in combination with each other; relied on
12 speculative, dangerous and misleading risk assessments; and failed to assure that the facility will be
13 operated in a manner that protects the health and safety of workers, the public (particularly including
14 the downwind community), and the environment. But the record as a whole could also allow a
15 reasonable agency to conclude that the risk assessments upon which Respondents rely were
16 accomplished in a manner consistent with prevailing standards of care (including those established
17 by the EPA), and that the facility – *if it performs as specified in the permit* – will operate consistently
18 with the Respondents' substantial obligations to ensure protection of health, safety, and the
19 environment.

20 Similarly, the record as a whole *could* support a finding of misrepresentation and suppression
21 of safety information by the Army with respect to some components of the facility and incidents of
22 agent release and other accidents at other facilities, but the record could also allow a reasonable
23 agency to conclude that the Army was not guilty of any misrepresentation, but rather privately

1 preserved its options during a complicated and persisting search for solutions, and responsibly
2 responded to and learned from incidents at other facilities that were no more numerous or hazardous
3 than the range of mishaps inevitable with any undertaking of the magnitude of a chemical weapons
4 incinerator.

5 On the other hand, because the safe operation of this facility is critically dependent upon
6 monitors whose fallibility is known to the agency, and whose accurate calibration and operation is
7 monitored predominantly by the Centers for Disease Control in Atlanta – but neither regularly nor
8 often; because a substantial minority of workers do not feel safe in approaching even their own
9 supervisors with safety concerns, and because of incentives and opportunities to dismiss monitor
10 malfunctions as “false positives” before they would otherwise be of concern to the Respondents;
11 because the Army as co-permittee has persisted in a pattern of minimal disclosure as to such basic
12 issues as its intentions with respect to a major component of the facility, has continued to insist
13 erroneously that it is lawful to prevent its employees from offering opinion testimony in court, and
14 has arguably discouraged disclosure of safety concerns at other facilities in “lessons learned”
15 meetings; because Congress has recognized the critical importance of whistleblowers to the safe
16 operation of such facilities; because the facility has no real time monitors to alert operators and the
17 downwind community to releases of substantial quantities of chemical warfare agent from the facility
18 in the event existing monitors fail to operate as designed; and because the permit and the procedures
19 contemplated for the operation of the facility contain no substantial alternative to the measure of
20 safety afforded by a requirement that the permittees prominently encourage employees with good
21 faith concerns related to the safety of the operation of the facility to voice those concerns to
22 supervisors and to Respondents if concerns are not addressed, I find that no reasonable agency would

1 fail to require whistleblower protections and related provisions, and remand the permit for such a
2 modification.

3 *Background*

4 This controversy is before me a third time. At issue is the order of Respondents rejecting
5 Petitioners' demand for revocation or modification of permit under which the United States Army
6 and its contractor, Washington Demilitarization Company (WDC), propose to incinerate enormous
7 quantities of extremely hazardous chemical weapons materials, including such agents as sarin and
8 mustard gas, and related munitions. The Petitioners have urged that the Umatilla Chemical Agent
9 Disposal Facility (UMCDF) can never work as contemplated by the existing DEQ/EQC permits, that
10 operation of the facility as contemplated would endanger health, safety, and the environment in
11 violation of state and federal law; that the agencies have failed to meet their obligations to protect
12 the public from those dangers; and that much safer alternative technologies are available. Petitioners
13 presented a wide range of expert and lay witnesses and documentary evidence in support of their
14 various contentions.

15 The agencies and the Intervenors, Washington Demilitarization Company and the United
16 States Army, contend that notwithstanding Petitioners' evidence, the record as a whole (including
17 also the evidence that was before the respondent agencies and received here, as well as that presented
18 here in support of the agencies' decision) would allow a rational agency to decline to revoke or
19 modify the permit, and that this court must therefore affirm the agencies' order under the applicable
20 and limited standard of review. The agencies and the Army presented a wide range of expert and
21 lay witnesses and documentary evidence in opposition to the Petitioners' contentions and in support
22 of the agencies' decision.

1 *Procedural History*

2 This matter originally came before me by virtue of a petition for review under ORS 183.484
3 challenging orders of the Department of Environmental Quality and the Environmental Quality
4 Commission (Respondents)¹ granting permits to Intervenor United States Army (Army) for storage
5 and treatment of hazardous waste and for discharge of air contaminants in connection with the
6 Army’s construction and operation of the Umatilla Chemical Agent Disposal Facility near
7 Hermiston, Oregon. Petitioners are organizations and individuals who contend that the operation
8 of the facility as approved by Respondents would subject them to severe risk of morbidity and
9 mortality, and would otherwise damage their environmental, wildlife, economic, and social interests.

10 The facility in question is intended to dispose of some 3717 tons of chemical warfare agents
11 which have been stored beginning in 1941 at the Umatilla Army Depot, now known as the Umatilla
12 Chemical Depot. All concerned agree that the stored agents are potentially lethal, and at least
13 Respondents and the Army agree that their continued storage is a hazard in itself. The stored
14 materials include nerve agents GB (also known as sarin) and VX, and the blister agent HD (known
15 as mustard). The material is stored in various forms, both in bulk and within munitions. The
16 Umatilla facility is one of eight such facilities planned or constructed after proving operations at a
17 prototype facility on Kalama Island known by the Army as Johnston Atoll. The existing site of
18 major interest to the Petitioners is at Tooele, Utah. The Umatilla facility as described in the existing
19 permit:

21 would use five incinerators of four different types housed in one facility to destroy
22 or treat the various components of the chemical weapon stockpile. Two liquid
23 incinerators would be used to destroy the liquid nerve and blister agents that are
drained from munitions and bulk containers. After munitions and bulk containers are

¹ “DEQ/EQC,” “the agencies,” and “Respondents” are used interchangeably in this opinion, though I attempt to use “the agencies” to refer to their function and decisions as administrative agencies, and “Respondents” to refer to their positions and contentions before this court.

1 drained, a deactivation furnace would be used to destroy explosives and propellants,
3 and a metal parts furnace would be used to thermally treat remaining metal parts. A
dunnage incinerator would be used to treat packing materials and miscellaneous
processing waste that potentially has been in contact with the chemical agents.

5 Also required for permitting are treatment units in the Brine Reduction Area
7 that de-water the brine from the pollution abatement system. The Brine Reduction
Area does not treat chemical agents.

9 DEQ/EQC's "Invitation to Comment on Findings (ORS
11 466.055 & ORS 466.060) and Risk Assessment" issued April
5, 1996

13 In their initial challenge to the permit authorizing the Army to construct and move towards
14 operation of the facility as just described (Mult. Co. No. 9708-06159), the Petitioners insisted that
15 they were entitled to contested case procedures, and that the Respondents failed to give adequate
16 consideration to their argument that the US Army is dangerously incapable of this undertaking.
17 Indeed, Petitioners "advised the court of their intention to seek leave to amend their petition to
18 include 'their allegation that Intervenor Army intentionally withheld or suppressed evidence' in the
19 proceedings before Respondents."² Petitioners also contended that the Respondents wrongfully
20 relied upon a critical component of the incinerator systems – carbon filters – which Petitioners
21 asserted had not been tested and would probably not work in this application; that the Respondents'
22 failed adequately to consider risks to sensitive populations such as fetuses, children, and the elderly;
23 that the Respondents gave inadequate consideration to alternate technologies for disposal of the
24 chemical agents; and that the facility as permitted includes two incinerators (a dunnage incinerator
25 and a deactivation furnace) and a brine reduction area, when all three have either already been
26 abandoned by the Army or are unlikely of deployment at Umatilla.

² This advice was in Petitioners' cover letter (of November 10, 1998) which accompanied Petitioner's
ADDITIONAL DOCUMENTARY EVIDENCE IN SUPPORT OF REVERSAL AND/OR REMAND OF THE
EQC's/DEQ's PERMIT DECISIONS, filed November 12, 1998, in Mult. No. 9708-06159. Presumably, my Order
of December 6, 1998, from which I take this quotation, preempted any such attempt to seek leave to amend in that
proceeding.

1 Petitioners also insisted that they had the right to put on evidence to “make the record” in
2 this court which I would review for substantial evidence under ORS 183.484.

3 In my initial review, I was assisted by substantial findings of fact by the agencies. I
4 concluded “that the ability of the court to go beyond the record [*i.e.*, consider evidence other than
5 that contained in the administrative record] is necessarily dependent upon the nature of the
6 challenges made by the Petitioners,” and that I could not go beyond the record as to the contentions
7 that the agencies’ findings were “not supported by substantial evidence in the record . . . viewed as
8 a whole.” In brief, I found the administrative record sufficient to support the agencies’ findings in
9 all respects but one, and ruled that any of Petitioners’ contentions based on evidence not before the
10 agencies must be presented to the agencies in the first instance before I could perform any function
11 on review.

12 The one issue as to which I could not find substantial support in the record was the extent to
13 which the agencies relied upon the role of carbon filters in finding that the facility would comply
14 with the relevant state and federal law. I found the record then in the administrative record
15 insufficient to support the notion that the carbon filters would provide *additional* safety, and the
16 agencies’ finding ambiguous as to whether the agencies *relied upon* the filters or found the planned
17 facility sufficiently in compliance with state and federal requirements *regardless* of the carbon
18 filters. For this reason, I remanded to the agencies “to determine what role the PAS carbon filters
19 play in this analysis.”

20 The agencies issued an order “clarifying” that they found the facility compliant with
21 applicable state and federal requirements regardless of the carbon filters, and I entered a final
22 judgment in Respondents’ favor in this phase of the litigation (*GASP I*, June 1, 1999).

1 The Petitioners, perhaps to preserve arguments, filed a second lawsuit, *GASP II* (Mult. Co.
2 No. 9908-08606), challenging the “Clarifying Order” issued by EQC on remand. I granted
3 Respondents’ motion for summary judgment on that order, and issued final judgment on June 19,
4 2000.

5 *GASP I* and *II* are now before the Court of Appeals on Petitioners’ appeals. Meanwhile,
6 Petitioners pursued a request they filed with the agencies just after my limited remand in *GASP I* for
7 a “Contested Case Hearing and Other Relief.” DEQ denied the request for a contested case hearing,
8 but agreed at the final court hearing in *GASP I* to treat the remainder of the letter as a request for
9 reconsideration or revocation of the permit. The Petitioners submitted and the agencies collected
10 written comments; the agencies held work sessions and meetings at which Petitioners and others
11 gave oral and written presentations.

12 The agencies opened a public comment period of July 19 through September 20, 1999,
13 regarding the carbon filters, and received studies including a new analysis from the National
14 Research Council (NRC). *See* Oliver Affidavit, Ex.3, at 277. DEQ issued a report on the issue and
15 recommended retention of the carbon filter system. Oliver Affidavit, Ex. 3, at 48, 57. EQC
16 accepted the DEQ staff recommendation on November 19, 1999. Oliver Affidavit, Ex. 3, at 8.

17 The agencies established a public comment period of October 18 through December 17,
18 1999, on the remaining issues raised in the Petitioners’s revocation request. EQC held a work
19 session November 19, 1999, at which Petitioners made an oral presentation.

20 On April 17, 2000, DEQ released its staff report. Oliver Affidavit, Ex. 2. That report
21 summarized the Petitioners’ contentions and the evidence then before the agencies, analyzed the
22 issues, and explained the staff recommendations against modification or revocation of the permit.
23 The report acknowledged that some issues remained subject to further consideration by the agencies,

1 while rejecting the remainder of the Petitioners’ arguments. On May 16, 2000, the Petitioners
2 responded in detail to the staff report, and presented additional information to the agencies. AR 174.
3 After public comments and a meeting at which Petitioners delivered an oral presentation (May 17-
4 18, 2000), EQC issued an order on July 14, 2000, denying Petitioners’ request for permit revocation
5 or modification. Oliver Affidavit, Ex. 1, at 36-39.

6 The order made no attempt to provide specific responses to the Petitioners’ arguments or
7 materials not addressed by the April 17, 2000, DEQ staff report, but denied Petitioners’ request for
8 modification or revocation, merely finding “insufficient evidence” to warrant modification or
9 revocation. The order set forth “Background Findings” describing the history of the proceedings,
10 “Findings Regarding Legal Standards for Permit Revocation” summarizing federal regulatory
11 provisions for modification, revocation, or termination of such permits (40 CFR §§ 270.41, 270.43),
12 and a “Conclusion of the Commission” as follows:

13 After reviewing the administrative record, and in particular, the
14 thorough analysis of the Staff Report dated April 17, 2000, the
15 Commission finds that there is insufficient evidence at this time to
16 warrant either unilateral modification or revocation of the UMCDF
17 hazardous waste treatment permit pursuant to the criteria set forth at
18 ORS 466.170 and 40 CFR 270.41 or 40 CFR 270.43.

19 Although EQC Chair Melinda Eden testified in this court that she thought EQC had
20 “adopted” the staff’s conclusions, the EQC did not expressly adopt any of the findings or reasoning
21 of the DEQ Staff report. The EQC order articulated no conclusions of law and made no specific
22 findings of fact.
23

24 On September 12, 2000, Petitioners filed the present Petition for Review pursuant to ORS
25 183.484. The petition reasserted the Petitioners’ contentions in *GASP I*, adding only assertions that
26 the agencies’ order rejecting modification or revocation of the permit is not supported by substantial
27 evidence and violates state and federal law, and that the agencies had violated Petitioners’ rights to

1 due process, equal protection, and civil rights by the agencies' failures "to revoke or significantly
2 modify the UMCDF permit."

3 On October 16, 2001, I denied the parties' cross motions for summary judgment. On April
4 19, 2002, I entered orders concerning the scope of issues, discovery, and the applicability of the
5 Oregon Evidence Code and the Oregon Rules of Civil Procedure to these proceedings. I agreed with
6 Respondents and Intervenors that we could not address the validity of the administrative decisions
7 subject to *GASP I & II*, and that review was limited to the Petitioners' challenges to the agency order
8 denying revocation or modification.

9 The Petitioners presented evidence in parts of October and November 2002. After the
10 conclusion of Petitioners' case in chief, Respondents and Intervenors sought involuntary dismissal
11 pursuant to ORCP 54B(2). On December 30, 2002, I elected pursuant to that Rule to "decline to
12 render any judgment until the close of all the evidence in chief." In March of 2003 and August of
13 2003, the parties adduced a large quantity of additional evidence on all of the issues pressed by the
14 Petitioners.

15 Petitioners' evidence addressed several persistent and expanded themes in their challenges
16 to the incineration plans of the Intervenors, such as the agencies' purported failure to assess the risk
17 of dioxin emissions to infants, children, and other sensitive populations, or to assess the non-cancer
18 risks of dioxin; the agencies' purported failure to consider the cumulative effect of emissions from
19 the operation of the facility given the background levels of exposure to dioxins, PCBs, metals,
20 particulate matter, pesticides and other hazardous substances; the limitations of perimeter monitors
21 as protection for nearby populations, including school children, in the event of a release of agent; the
22 purported unproven and untested technology for detecting or preventing hazardous emissions; the
23 persistence in the permit of a dunnage incinerator that the Army has apparently abandoned while

1 allegedly concealing that abandonment from the agencies; the purported unreliability of the Army's
2 risk assessment contractor in light of the role of risk assessment in the agencies' function; the
3 agencies' rejection of purportedly superior neutralization technology for at least some of the
4 stockpile based on an assertedly inadequate comparison of that technology with incineration; and
5 the record of mishaps and alleged concealment of deficiencies at this and similar facilities.

6 Intervenor and Respondents challenged Petitioners' evidence through cross examination and
7 offered evidence of their own on the issues raised by the Petitioners. Petitioners brought a motion
8 for sanctions alleging that the Army had intimidated a witness. That matter was briefed and then
9 argued on February 26, 2004. I issued an order resolving that motion on March 1, 2004. All parties
10 have participated fully in briefing the remaining issues before this court. The final brief was
11 submitted July 14, 2004.

12 *Applicable Substantive Law*

13 Pursuant to treaty obligations under the Chemical Weapons Convention,³ Congress directed
14 the Army to accomplish the destruction of chemical warfare agent in such a manner as to provide
15 (1) maximum protection of the environment, the general public, and the personnel who will be
16 involved in the destruction process; (2) adequate and safe facilities designed solely for the
17 destruction of the chemical agent; and (3) cleanup, dismantling, and disposal of the facilities when
18 the disposal program is complete. 50 USC § 1521. Oregon law incorporates federal statutory and
19 regulatory protections for the operation of a facility designed to treat or dispose hazardous materials,
20 and adds its own stringent requirements. These provisions require Respondents to address specific
21 issues deemed relevant to health, safety, and environmental concerns.. *E.g.*, 42 USC §6925; 40 CFR

³ The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed January 13, 1993, ratified by the United States on April 25, 1997, and entered into force on April 29, 1997. Treaty Doc 103-21, 1993 U.S.T. LEXIS 107, <http://www.fas.harvard.edu/~hsp/cwc/cwc.html> [hereinafter cited as Chemical Weapons Convention].

1 part 124; 40 CFR §270.32(b); ORS 466.010; 466.055; OAR 340-100-002; OAR ch. 340, div. 120.

2 As Petitioners stress, for example, ORS 466.010 declares that it is the purpose of relevant Oregon
3 legislation to “[p]rotect the public health and safety and environment of Oregon to the maximum
4 extent possible” (ORS 466.010(1)(b)(A); 466.055(1)(b)); ORS 466.055 directs that before EQC
5 *issues* a permit, it must find that the proposed facility “[p]rovides the maximum protection possible
6 to the public health and safety and environment;”⁴ that “the proposed facility uses the best available
7 technology for treating or disposing of hazardous waste;”⁵ that “operation of the proposed facility
8 would result in a higher level of protection of the public health and safety or environment;”⁶ that the
9 proposed operator have adequate financial and technical resources and demonstrated ability and
10 willingness to operate the facility in compliance with safety requirements;⁷ that the facility “has no
11 major adverse effect on either: (a) Public health and safety; or (b) Environment of adjacent lands.”⁸

12 As Respondents and Intervenors stress, however, the criteria for modification or revocation
13 of a permit are somewhat less ambitious. State and federal law provide three bases for modification
14 or revocation of a permit:

- 15 (1) Noncompliance by the permittee with any condition of the
16 permit;
17 (2) The permittees’ failure in the application or during the permit issuance
18 process to disclose fully all relevant facts, or the permittee’s
19 misrepresentation of any relevant facts at any time; or

⁴ ORS 466.055(1) actually imposes this criterion with respect to the “proposed facility *location*.”

⁵ ORS 466.055(3) actually provides: “The proposed facility uses the best available technology for treating or disposing of hazardous waste or PCB *as determined by the department or the United States Environmental Protection Agency*.” (Emphasis added)

⁶ ORS 466.055(4)(b)

⁷ ORS 466.060(1)

⁸ ORS 466.055(5)

1 (3) A determination that the permitted activity endangers human
2 health or the environment and can only be regulated to acceptable
3 levels by permit modification or termination.

4 40 CFR § 270.43; *see also* 40 CFR § 270.41;
5 ORS 466.170; OAR 340-1—0002; 340-105-0041⁹

6 Accordingly, arguments about whether the proposed facility and procedures employ the
7 “best available technology” cannot themselves afford grounds for revocation or modification of
8 the permit, except to the extent that they are subsumed within contentions that the “permitted
9 activity endangers human health or the environment.”¹⁰ References to such standards as
10 “maximum protection possible to the public health and safety and environment” may similarly
11 assist in interpreting what constitutes an “acceptable level[]” of danger to health or environment,
12 but cannot themselves require revocation or modification of the permit. Also relevant to any
13 review is the deadline for destruction under federal and treaty¹¹ law, which the evidence
14 established is presently 2007.

15 *Standard of Review*

16 As when this matter was first before me, I start with ORS 183.484,¹² which provides that
17 my limited function is to determine whether the agencies have erroneously interpreted a

⁹ Petitioners insist that 42 U S C § 6925(d) *requires* revocation. That provision requires revocation upon a finding by a State “of noncompliance by a facility . . . with the requirements of this section or section 6924.” Petitioners have not indicated what provisions they assert the Army has “violated,” but argue that *criteria* established by state or federal law call for modification or revocation. There is no “finding” of misrepresentation, and it is for the agencies – at least in the first instance – to determine whether any misrepresentation is sufficient to call for modification or termination.

¹⁰ Again, Petitioners may also be overlooking the fact that ORS 466.055(3) actually provides: “The proposed facility uses the best available technology for treating or disposing of hazardous waste or PCB *as determined by the department or the United States Environmental Protection Agency.*”

¹¹ Chemical Weapons Convention, *supra* note 3.

¹² Since this matter was last before me, the Legislature amended ORS 183.484 by adding a new subsection (4) to the effect that the agency may withdraw and change its order before the court hearing on a petition. The amendment did not change the statutory language quoted above, but only its numbering. 1999 Or Laws ch 113.

1 provision of law, exceeded the range of discretion delegated to the agencies by law, or issued an
2 order not supported by substantial evidence. ORS 183.484(5)(c) specifies:

3 Substantial evidence exists to support a finding of fact when the
4 record, viewed as a whole, would permit a reasonable person to
5 make that finding.

7 When the parties last joined issue on the question of the role of this court in developing
8 the “record” by which to determine whether the “order” is supported by substantial evidence, I
9 concluded that the answer depended upon the nature of the contentions of the party challenging
10 the administrative order.¹³ Since then, however, the Oregon Supreme Court has interpreted ORS
11 184.484 in a manner irreparably inconsistent with my earlier analysis.

12 *Norden v. Water Resources Dept.*, 329 Or 641 (2000), critically addressed a trial court’s
13 role in a review of agency action in an “other than contested case” proceeding. *Norden*
14 ultimately upheld an order (in the form of a letter) informing a landowner that she could not
15 divert water from a spring on her property without obtaining a water right permit. The sole issue
16 of fact was whether waters leaving the spring would, if undiverted, flow to the land of another.

¹³ Specifically, I reasoned: “When the only argument for reversal or modification is that the agency’s ‘order is not supported by substantial evidence in the record,’ the ‘record’ in question is the one which comes from the agency. ORS 183.484(4)(c) directs that ‘Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.’ In the context of the statutory language and settled American administrative law, the ‘record’ which must be viewed as a whole is the administrative record. The ‘record’ which is ‘made’ in the circuit court consists of those portions of the administrative record which are received by the court and the pleadings and briefs of the parties. The ‘record’ contemplated as ‘insufficient for judicial review’ in *Fadeley [v. Oregon Ethics Cmmn]*, 25 Or App 867 (1976) is one in which a party contends that the agency erred by doing nothing. In a proceeding under ORS 183.490, in which a Petitioner contends that an agency ‘has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision,’ a party may well be permitted and required to offer evidence in circuit court to establish that an agency has unlawfully refused to act or that any delay is ‘unreasonable.’ Evidence outside the agency record may also be adduced to show that the agency’s order is ‘[i]nconsistent with an agency rule, an officially stated agency position, or a prior agency practice’ under ORS 183.484(4)(b)(A). Depending on the circumstances, ‘developing’ a record in circuit court may entail evidence extrinsic to the agency record when the Petitioner contends that the agency has acted contrary to law within the meaning of ORS 183.484(4)(b)(C). But that a record must be ‘developed’ in circuit court does not imply that Petitioners are entitled to add to the administrative record to support their contention that the Respondents wrongly decided the questions they addressed, for such contentions are answered by determining whether ‘the [administrative] record, viewed as a whole, would permit a reasonable person’ to reach those decisions. The bulk of Petitioners’ assaults on the Respondents’ conclusions are therefore unavailing in this forum.” Opinion and Order on Cross Motions for Summary Judgment, Mult. Co. No. 9708-06159, 15-16 (December 6, 1998).

1 The legal issues concerned the meaning of the provisions of ORS 183.484 with respect to the
2 scope of “the record” subject to review by the court. The trial court had allowed the parties to
3 introduce evidence in addition to what the agency knew when it issued the order: “evidence that
4 the agency and petitioner had obtained after the agency issued its order.” The circuit court found
5 that a reasonable person would have insufficient evidence upon which to conclude that the spring
6 water would flow off the petitioner’s property if undiverted, and entered a judgment declaring
7 (under ORS 183.486(1)) that the Petitioner could use the water without a permit.

8 The Court of Appeals held the circuit court had properly considered evidence in addition
9 to that before the agency when it issued the order to petitioner, but erred in concluding that the
10 agency’s order was not supported by substantial evidence in the record.

11 On review, the Supreme Court affirmed the Court of Appeals decision in both respects.
12 Addressing the scope of “the record” for purposes of review in a circuit court in an other than
13 contested case, the Supreme Court construed a statute which in relevant part contained this
14 language:¹⁴

15 **ORS 183.484 Jurisdiction for review of orders other than**
16 **contested cases; procedure; scope of court authority.**

17 * * * *

18 (5)(a) The court may affirm, reverse or remand the order. If the
19 court finds that the agency has erroneously interpreted a provision
20 of law and that a correct interpretation compels a particular action,
21 it shall:

22 (A) Set aside or modify the order; or

23 (B) Remand the case to the agency for further action under a
24 correct interpretation of the provision of law.

25 (b) The court shall remand the order to the agency if it finds the
26 agency's exercise of discretion to be:

27 (A) Outside the range of discretion delegated to the agency by law;

¹⁴ As noted in footnote 9, *supra*, the statute was amended in 1999; in relevant part, the statute differs only in the numbering of the sections; what the *Norden* Court addressed as (4) is now numbered (5); I quote the current version.

1 (B) Inconsistent with an agency rule, an officially stated agency
2 position, or a prior agency practice, if the inconsistency is not
3 explained by the agency; or
4 (C) Otherwise in violation of a constitutional or statutory
5 provision.
6 (c) The court shall set aside or remand the order if it finds that the
7 order is not supported by substantial evidence in the *record*.
8 Substantial evidence exists to support a *finding of fact when the*
9 *record, viewed as a whole*, would permit a reasonable person to
10 make that finding
11 (6) In the case of reversal the court shall make special *findings of*
12 *fact* based upon the evidence in the *record* and conclusions of law
13 indicating clearly all aspects in which the agency's order is
14 erroneous.

15 (emphasis by the Court)

17 At the Court of Appeals, the petitioner had argued that the “record” on review must be
18 confined to the information that the watermaster had when he issued the order, while the
19 Department argued that because the order was one other than in a contested case, the record on
20 judicial review consisted of both the information on which the watermaster had relied in issuing
21 the order and the evidence that the parties developed after that time. At the Supreme Court,
22 however, the Department agreed with the Petitioner that the record should be limited to evidence
23 before the agency at the time it issued its order. The Supreme Court, however, reasoned “[t]hat
24 the parties might now agree on the proper interpretation of the relevant statute is of no moment.
25 This court’s task is to determine the intent of the legislature, ORS 174.020, not to accede to the
26 parties’ agreement about the meaning of the statute.”¹⁵

27 The Supreme Court construed ORS 183.484’s references to “record” and “findings” with
28 this reasoning:

¹⁵ 329 Or at 645, n3. This begs the question whether the Court *should* determine a question in a case in which advocates are not positioned to give the Court the best arguments on both sides of the issue. *See, e.g., Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 382 (1991) [“an appellate court ordinarily considers an issue * * * through competing arguments of adversary parties with an opportunity to submit both written and oral arguments to the court.”] Arguably, the *Norden* court would have benefitted from a preview of the sorts of difficulties the Court’s construction raises for review in other common “other than contested case” reviews.

1 Although ORS 183.484 contemplates a record for review in all
3 circumstances, and findings of fact based on that record when the circuit court
5 reverses the agency, nothing in the APA directs an agency in other than a
7 contested case proceeding to make a record or to make findings of fact before
9 issuing its order. *See Oregon Env. Council*, 307 Or. at 37, 761 P.2d 1322 (APA
11 says little about “that large body of agency actions” that are orders in other than
13 contested cases). Circuit courts are record-making, fact-finding courts. ***We
15 conclude that the reference in ORS 183.484 to the “record” is to the record that
17 is made before the circuit court and that the reference to “findings of fact” in
19 ORS 183.484(5) is to the findings that the circuit court makes based on the
21 evidence in that record when it reverses the agency.***

23 The absence of a requirement that the agency in other than a contested
25 case proceeding make a record or findings of fact before issuing its order means
27 that the first opportunity that a party might have to present evidence is before the
29 circuit court. Although the text of ORS 183.484 is not explicit regarding the scope
31 of the record on review, the text suggests that the legislature did not intend to
33 limit the scope of the record on judicial review only to the evidence that the
35 agency had before it when it issued its order.

37 ORS 183.484(4) provides additional support for that conclusion. As noted,
39 judicial review of an order in other than a contested case includes review for
41 substantial evidence in the record “as a whole.” ORS 183.484(4)(c). This court
43 has held that review for substantial evidence in the record as a whole under the
45 APA requires a court to consider all the evidence in the record. *Younger v. City of
Portland*, 305 Or. 346, 356, 752 P.2d 262 (1988). ***“Whole record” review means
consideration of whatever evidence the record may contain that would detract
from as well as support the agency’s order. Id. at 354, 752 P.2d 262 (citing
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456
(1951)). In other than a contested case proceeding, the first opportunity that a
party might have to make a record of the evidence that would detract from an
agency’s order is on judicial review. Limiting the scope of the record to the
evidence that was available to the agency when it issued its order would
undermine the “whole record” review required by ORS 183.484(4)(c).***

 The context of ORS 183.484, describing the process for contested cases,
also is instructive regarding the legislature’s intent. ORS 183.415(1) provides that,
in a contested case, all parties “shall be afforded an opportunity for hearing after
reasonable notice * * *” and that the record developed at the hearing must reflect
***“a full and fair inquiry into the facts necessary for consideration of all issues
properly before the presiding officer in the case.”*** ORS 183.415(10). ORS
183.415(11) and (12) identify what ***the record in a contested case “shall
include,” such as pleadings, motions, intermediate rulings, evidence received or
considered, questions and offers of proof, objections and rulings thereon,
proposed findings, and a verbatim record of all motions, rulings and testimony.
A final order that is issued after a contested case hearing “shall be
accompanied by findings of fact and conclusions of law.”*** ORS 183.470(2).

 Those statutes reveal that, in a contested case, the legislature has imposed
on agencies the requirement of ***trial-like proceedings*** that culminate in a record,

1 findings of fact, and conclusions of law that must accompany the agency’s final
order. Judicial review of an order in a contested case is conferred on the Court of
3 Appeals, and its review is “confined to the record” that was made before the
agency. ORS 183.482(7). See ORS 183.482(5) (Court of Appeals may order
5 agency to take additional evidence under specified circumstances). ORS
183.482(8)(c), like ORS 183.484(4)(c), provides for review for substantial
7 evidence of the whole record. In the contested case context, the agency has made
the record by the time that judicial review occurs. In other than contested case
9 proceedings, there may be no record to review, or only so much record as
support’s the agency’s order, until a record is made before the circuit court. *We*
11 *find no suggestion in the APA that the legislature intended the record in other*
than a contested case proceeding to be less complete or well developed than the
13 *record in a contested case proceeding.*

For the foregoing reasons, we agree with the Court of Appeals that the
15 legislature’s intent is clear based on an examination of the text and context of
ORS 183.484. *On judicial review of an order in other than a contested case*
17 *proceeding, ORS 183.484 affords the parties the opportunity to develop a record*
like the one that parties are entitled to develop at an earlier stage in a contested
19 *case proceeding.*

That conclusion does not expand the circuit court’s role in reviewing the
21 record on review in other than a contested case proceeding, however. As noted,
ORS 183.484(4)(c) and 183.482(8)(c) both provide that the circuit court’s review
23 of the record is review for substantial evidence. *The court’s evaluation of the*
record is limited to whether the evidence would permit a reasonable person to
25 *make the determination that the agency made in a particular case. See Garcia v.*
Boise Cascade Corp., 309 Or. 292, 295, 787 P.2d 884 (1990) (describing
27 substantial evidence review).

29 329 Or at 647-49, *emphasis added, footnote omitted*¹⁶

31 Citing with approval *Erck v. Brown Oldsmobile*, 311 Or 519, 528 (1991), *Norden* implies
32 that a substantial evidence review does not require the reviewing court to “explain away”
33 conflicting evidence. Any doubt about *Norden*’s impact on the ability of a reviewing court to
34 *require* an agency to make findings in an other than contested case is at least temporarily
35 resolved by *Wilbur Residents for a Clean Neighborhood v. Department of Environmental*

¹⁶ Again, the Court’s citations to subsections of ORS 183.484 are altered by the 1999 amendment; references to ORS 183.484(4) and (5) in the opinion now point to ORS 183.484(5) and (6), respectively.

1 *Quality*, 176 Or App 353 (2001), which on the authority of *Norden*¹⁷ reversed as erroneous a
2 circuit court judgment requiring DEQ to make findings of fact.

3 Although I am certainly bound by and will follow the law proclaimed by these appellate
4 decisions, they dramatically alter both common understandings of the workings of administrative
5 law and the demarcation among legislative, executive, and judicial roles. Traditional
6 administrative law requires agencies to make findings of fact and courts to review administrative
7 records for substantial evidence for support for those findings – exposing the administrative
8 reasoning so as to ensure, through judicial review, the agency’s obedience to legislative
9 directives.¹⁸ Those directives are critical both as to the substantive tasks delegated to the
10 agencies and the limitations on the breadth of agency discretion. Traditional administrative law
11 is erected on the assumption that the legislative body has delegated fact finding and policy
12 making responsibilities to an executive agency within limits established by the legislative body,
13 and that the functions of courts are to honor the delegation when the agency acts within those
14 limits and to enforce the limits when an agency exceeds them – by specifying any manner in
15 which the agency has failed to adhere to the limits imposed by the legislature (or organic law)
16 and by either altering the result as required and permitted by law or remanding issues to the

¹⁷ *Norden* itself does not actually address the issue, but merely says that the APA does not *require* findings by an agency. And it is only the “findings of fact” language in ORS 183.484(6) – which is expressly directed to a reviewing court that reverses an agency order – that *Norden* directs to the reviewing court. *Norden* does not say that an agency cannot make a “finding” to be compared with the record as contemplated by ORS 183.484(5)(c), and the Court has in other contexts found the necessities of appellate review sufficient to permit courts to require findings not otherwise mandated. *See, e.g., McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84 *on rehearing* 327 Or 185 (1998). *See also 1000 Friends of Oregon v. Metro*, 174 Or App 406 (2001)[meaningful review impossible without findings and conclusions].

¹⁸ A good example of how the role of the agency and that of the court are supposed to combine in the public interest is provided by *Marbet v. Portland Gen. Elect.*, 277 Or. 447 (1977), a contested case review. Until *Norden*, appellate courts considered findings essential to meaningful review. *See, e.g., McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84 *on rehearing* 327 Or 185 (1998)[attorney fees]; *See also 1000 Friends of Oregon v. Metro*, 174 Or App 406 (2001)[LUBA].

1 agency for further agency action or proceedings in accordance with those limits. The *Norden* –
2 *Wilbur Residents* line has largely thwarted this traditional function of judicial review of agency
3 action, and thereby placed agency action far further from *legislative* control than under traditional
4 notions of administrative law.

5 By allowing the agency to make no findings of fact, these decisions may well insulate
6 errors of law. For example, assuming (without deciding) that it would constitute a violation of
7 legislative mandate for the Respondents critically to rely for the administrative decision in this
8 case upon a public misperception that continued storage presents a high risk of harm, this court
9 has no way of telling whether the agencies have relied upon the public's perception as to the risk
10 of storage or whether the agencies believe that perception to be grossly exaggerated. The
11 evidence in this case is certainly consistent with the notion that the public perception of the risk
12 of storage weighed substantially in the agencies' decision, and that the agencies understand that
13 perception to be substantially exaggerated. But it is also entirely plausible, notwithstanding
14 evidence susceptible to these inferences, that the agencies do not find the public perception
15 exaggerated or that the public perception played no role in the agencies' decision. Numerous
16 other examples are available: there are no findings as to what the agency believes to be the total
17 likely dioxin product during the facility's projected operations or what the agency believes to be
18 the risk to human health associated with that product. There are no findings as to how likely the
19 agency believes large or small catastrophes to be during the projected operation of the facility (in
20 light of incidents at this and other facilities brought to the agencies' attention), or what the
21 agencies believe the risks associated with such catastrophes to be. There are no findings as to the
22 agencies' conclusion whether the Army was deceptive about the use of the dunnage incinerator
23 or its intentions about the treatment of secondary waste, or what level of trustworthiness is

1 acceptable to the agencies. There are no findings as to the agencies’ conclusions regarding the
2 reliability with which existing procedures test the function of devices designed to detect agent – a
3 function upon which the safety of the facility critically depends.

4 Without findings or conclusions, I cannot ascertain whether the agencies, with their
5 access to expertise, determined that large numbers of “at risk” portions of the population will or
6 will not be subject to death or illness as a result of risk figures ignoring their susceptibility;
7 decided that alternative methods of disposal of bulk wastes are or are not substantially less
8 dangerous to health, safety or the environment than incineration as to bulk wastes; determined
9 that Dr. Harrison is or is not correct about the inapplicability of steady-state air quality models;
10 determined that non-cancer levels of dioxin do or do not pose serious health risks; determined
11 that persistent low level exposures to other toxins do or do not pose significant health risks, and
12 so on.

13 Under *Norden*, I am to affirm the agencies’ *result* if a rational agency *could* reach that
14 result in light of the record as a whole. Without findings, I may thereby uphold a result that the
15 agencies reached by misconstruing or violating the legislature’s mandates as to how the agencies
16 are to conduct their functions, even though the same agencies might reach a different result were
17 they to conduct their functions without misconception or violation of those mandates.¹⁹

18 Without findings, it may also be impossible to know whether substantial evidence supports the
19 agencies’ *rationale* for their result.²⁰ This profoundly diminishes the function of judicial review

¹⁹ I am not suggesting that the agencies have violated the law, but only that a reviewing court is severely crippled in its function of determining the lawfulness of agency analysis by the absence of findings.

²⁰ Although *Norden* contemplates that this court would make findings and articulate conclusions of law to facilitate review by an appellate court, that distinction does not alleviate the difficulty. After development of a record, it is for this court to determine whether *the agency* has obeyed the law, not abused its discretion, and reached a result supported by the evidence; that task is no less impeded by the lack of findings and conclusions by *the agency* than is the Court of Appeal’s task in making precisely the same determination in a contested case review. *Compare*
(continued...)

1 to ensure that agencies exercise their fact finding and policy making functions consistently with
2 legislative directives.

3 Moreover, by requiring that I uphold an agency’s result if a rational agency *could* reach
4 that result based on evidence in the record “as a whole” – including, as in this case, vast
5 quantities of information that may not have been before the agency when it reached that result –
6 *Norden* largely abrogates a major rationale for delegation to an agency: the agency’s expertise.
7 Under traditional notions of administrative law, a reviewing court finding that a result was based
8 on *findings* unsupportable under the evidence or *reasoning* inconsistent with governing law
9 would, unless a result were dictated by the law and facts (and absent emergency), remand the
10 case to the agency for application of its expertise to the facts in light of the defects identified by
11 the court and any supplemental evidence the agencies might receive for *agency* evaluation. In
12 short, it makes no sense to delegate decisions to an agency and then uphold a result based in any
13 substantial way on evidence which the agency has never had the occasion to evaluate in light of
14 that expertise.²¹

15 Although the result in *Norden* makes perfect sense when a challenger contends that an
16 agency violated applicable law in respects that do not appear in the agency record,²² or in a

²⁰ (...continued)

ORS 183.484(5) with ORS 183.482(8). Surely, neither *Norden* nor the legislature intended that this court would substitute its findings for the discretion and expertise of the agency whose order is subject to review.

²¹ Petitioners argue the converse: that the statutes as correctly interpreted by *Norden et al* demonstrate that the legislative intent was *not* to rely on administrative expertise. Given the investigative and evaluative machinery of the agency process, I am unpersuaded – and certain that the legislative intent would prefer agency expertise to judicial evaluation. The flaw of the *Norden* line in this respect is that upholding a result based on how an agency *might* evaluate evidence it has never seen invokes neither judicial nor administrative expertise – surely not the intent of a rational legislature.

²² For example, should an aggrieved party challenge the factual prerequisites to lawful exceptions or limitations to competitive bidding requirements for technology contracts, the evidence of violation may be inherently extrinsic to the *agency* record. See OAR 125-320-0010, 125-310-0012.

1 controversy in which one factual predicate is determinative and either true or not true – whether
2 spring water, if undiverted, would flow off a landowner’s property to the land of another –
3 *Norden*’s result creates enormous difficulties in a case such as this involving issues of extreme
4 complexity and the exercise of agency expertise and judgment in pursuit of critically important
5 public interests. *See* 42 USC §6925; 40 CFR Part 124; 40 CFR §270.32(b); ORS 466.010;
6 466.055; OAR 340-100-002; OAR ch. 340, div. 120. It was presumably for good reason that the
7 legislature delegated these responsibilities to the agencies in question. And it is obviously of
8 substantial public importance that this court be able to perform its limited function of review to
9 determine whether the agencies have erroneously interpreted a provision of law, exceeded the
10 range of discretion delegated to the agencies by law, or issued an order not supported by
11 substantial evidence. ORS 183.484.

12 The public interests expressed in the statutes, state and federal, that guide the agencies’
13 decisions whether and how to permit the incineration of hundreds of tons of deadly waste are
14 enormous. The ability of the courts to determine whether the agencies have erroneously
15 interpreted a provision of law, exceeded the range of discretion delegated to the agencies by law,
16 or issued an order not supported by substantial evidence is of corresponding importance. Surely
17 the significance of that role cannot turn on the agencies’ election between contested and non
18 contested case proceedings.

19 If I conclude that the evidence is insufficient regardless of an agency’s hidden reasoning
20 to support the outcome, I am directed to make my own findings and remand to the agency. ORS
21 183.484(6). But the next review is similarly insulated from meaningful scrutiny by the absence
22 of any requirement for findings or, presumably, conclusions of law.

1 In *GASP I*, the agencies made extensive findings which I sustained without giving
2 Petitioners the opportunity to “develop the record” in this court as is now apparently their right
3 under *Norden*. I remanded to the agencies with one question - had the agencies *relied* on the
4 carbon filters in reaching their conclusion that the incineration facility was consistent with all
5 state and federal standards, or did the agencies reach that conclusion *regardless* of the efficacy of
6 those filters? The agencies responded that they were not relying on the efficacy of the filters, and
7 I affirmed. After *Norden*, or at least after *Wilbur Residents v. DEQ*, I appear to be powerless to
8 conduct such a dialogue.²³

9 My role, then, is to determine whether the record viewed as a whole would permit a
10 reasonable agency to deny Petitioners’ requests for revocation or modification of the permit here
11 in question.²⁴ That issue cannot be separated from the agencies’ statutory responsibilities, but it

²³ For whatever it may be worth, *Norden*’s suggestion that agencies are not required to make findings in other than contested cases is quite severable from its conclusion that Petitioners on review in such cases must be permitted to develop the record in circuit court. In the context of the statute and of administrative law, it makes perfect sense to read 183.484(5)(c) as referring to *the agency’s findings* in prescribing that “Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make *that finding*,” while requiring findings *by the court on review* in subsection (6): “In the case of reversal *the court* shall make *special findings of fact* based upon the evidence in the record and conclusions of law indicating clearly all aspects in which the agency’s order is erroneous.” Even if the statute does not *require* findings, the Supreme Court is not without power to extract such a requirement from the role of the agencies and the court on review. *See, e.g., McCarthy v. Oregon Freeze Dry, Inc., 327 Or 84 on rehearing 327 Or 185 (1998)*. I am, of course, bound by *Norden* and *Wilbur Residents v. DEQ*.

²⁴ In their Reply Brief, Petitioners suggest that the agencies have so thoroughly failed to consider health risks as to have forfeited their claim to deference. In the scheme of judicial review of agency decisions, such assertions would be cognizable under the notion that an agency has exceeded or abused its discretion or has violated applicable statutes. In the context of the issues raised by the Petitioners in these proceedings, however, and given the connection between the agencies’ statutory obligations and the reasonableness of their decision, those issues are largely subsumed by the question whether the record as a whole would permit a reasonable agency to reach the result the agencies reached. If in light of the record viewed as a whole, the agencies abused their discretion or violated statutory obligations in failing to make an inquiry concerning a given risk, for example, the resulting decision would presumably be on a reasonable agency could not reach. The combination of sustaining a *result* based on a record developed in court and without the benefit of agency findings, however, surely restricts the role of the courts in assessing the lawfulness of agency decision-making, and complicates the task of anyone undertaking to seek relief on the basis that an agency failed to perform its legal obligations.

1 surely precludes substituting this court’s judgment for that of the agencies. For convenience, I
2 will refer to the standard of review as “the applicable standard of review.”

3 ***Substantive Contentions***

4 Petitioners advance numerous arguments that the Respondents’ decision declining to
5 revoke or modify the permit cannot be sustained in light of Respndents’ obligation to protect
6 health and the environment. Because the evidence, the contentions, and my analysis all make it
7 more efficient to do so, I will treat many of the Petitioners’ contentions in groups. I assess each
8 principal contention under the applicable standard of review.

9 ***Human and other Health Risks:*** Petitioners adduced compelling evidence that the
10 facility may produce many *tons* of pollutants, including toxic industrial chemicals, known and
11 unknown, including dioxin, dioxin-like compounds, lead, mercury, by products of agent
12 degradation, and particles of incomplete combustion that could increase the risks of cancer,
13 adverse neurological consequences, and other forms of morbidity and mortality, as well as
14 adverse consequences to the environment and to wildlife. Petitioners mounted credible attacks
15 on the methodologies, impartiality, and comprehensiveness of risk assessments upon which the
16 agencies’ result ultimately depends, raising issues about the existence of reference doses,
17 sensitive populations, and the impact of the already existing levels of such toxins in general and
18 in subgroups within our population. Petitioners’ challenge with respect to dioxin is
19 representative, well supported by the record they created, and alarming:

21 The nation’s (and world’s) population has already been exposed to
22 dangerous quantities of this ultra-toxic chemical via the historic practice of
23 permitting one new dioxin source after another on the rationale that the
24 new source in and of itself did not pose a substantial risk, until the
25 cumulative impacts of all these new sources did in fact cause a dramatic
risk first to the nursing infant, and now children and adults as well. This

1 unacceptable risk from cumulative dioxin exposure was created one
2 facility at a time and can only be eliminated one facility at a time.²⁵

3
4 On the other hand, Respondents and the Intervenors provided substantial and competent
5 evidence that the facility, *if it and its filters, its processes and its monitoring systems function as*
6 *designed*, will pump out dioxin emissions that would total less than *one-third* of what one diesel
7 truck would produce running for the same time at the same place; that the protocols underlying
8 the risk assessments upon which the agencies relied were consistent with extensive EPA and
9 regulatory practice and requirements; and that the health risks associated with the anticipated
10 emissions are “negligible” and “acceptable.”

11 Significantly, the permit requires that risk assessments be repeated after trial burns of
12 agent.

13 Although a reasonable agency could well choose to draw the line against the proliferation
14 of industrial chemicals at this facility, and could choose to view risk assessment protocols
15 inadequate to provide the confidence and accuracy claimed for their conclusions,²⁶ I cannot
16 conclude that no reasonable agency could instead view prevailing risk-assessment protocols as
17 reasonable; the human, environmental, and wildlife health risks as “acceptable,” and

²⁵ Petitioners’ Post Trial Brief at 29-30. The “historic practice of permitting” dioxin sources was inadvertent at first, as major sources of dioxin were pumping that toxin into our air before anyone was aware of the consequences. Probably the major source of dioxins (at least now that automotive emissions – unlike truck emissions – are regulated to protect against dioxin) is municipal waste incineration. Petitioners’ evidence could reasonably lead one to conclude that as members of an industrial society at the turn of the century, all of us carry dioxin levels sufficient to explain the rise of cancer, many consume fish loaded with toxic levels of mercury, and our progeny’s overall IQ directly reflects the level of lead that we collectively tolerate in our environment.

²⁶ The evidence could support a conclusion that commonly accepted risk assessment protocols arrive at coefficients to handle speculative risks through the wholly unverified consensus of experts who don’t know and therefore negotiate an answer, then apply those coefficients to mask what remains speculation in the apparent precision of numerical expression to two or three decimal points. “Risk assessment is like a captured spy: torture it and it will tell anything you want” is correctly attributable to Dr. Mary O’Brien, not Melinda Eden (as noted by Respondent’s counsel’s letter of July 16, 2004), but Dr. O’Brien was quoting William Rucklehouse, then head of EPA, and the analogy remains a credible challenge to risk assessment methodology. Nonetheless, prevailing risk assessment methodology is consistent with the standard of care of all manner of complex public and private undertakings.

1 modification or revocation of the permit as unnecessary – at least in light of the existing permit
2 requirement of ongoing assessments after trial burns of agent.

3 ***Alternative Technologies:*** Petitioners from the outset have promoted non-incineration
4 neutralization technologies as safer than the incineration process approved by Respondents.
5 They produced evidence which could lead a reasonable agency to conclude that neutralization
6 approaches are inherently far safer than incineration, as they do not release the products of agent
7 neutralization into the environment as stack emissions, but as liquids which can be held, tested,
8 and re-processed if necessary before release. In part because of the duration of this controversy,
9 Petitioners were also able to adduce evidence that neutralization technologies have by now
10 demonstrated their practical utility to the extent that the Army has used or plans to use
11 neutralization technologies to destroy agent at Aberdeen, Blue Grass and Pueblo chemical
12 weapons sites, and that the Army estimates a far smaller quantity of dioxin, PCBs, and hazardous
13 waste emissions from alternative neutralization facilities, and less water consumption, than with
14 incineration.

15 On the other hand, the issues before me do not include the propriety of the initial permit
16 issuance, and the relevance of arguments addressing “best available technology” is significantly
17 limited.²⁷ Respondents and the Intervenors produced evidence which could lead a reasonable
18 agency to conclude that although experience with neutralization technologies is growing and
19 promising, there are more stacks from a neutralization facility (including diesel exhaust stacks
20 related to heating water), many unknown emissions and risks of emissions, and risks of
21 catastrophic failure which cloud assurances of safety. Moreover, alternative technology
22 addresses only the agent itself, not the containers that store bulk agent nor the munitions

²⁷ See pages 11-13, *supra*.

1 containing agent which represent much of the stockpile at Umatilla, and which would in any
2 event need to be disposed of by traditional technologies, most probably incineration.

3 In view of the passage of time in light of treaty deadlines for agent destruction, the
4 tremendous investment in the existing facility which is on the verge of full operations as of this
5 writing, and *if the existing incineration facility, and its filters, its processes and its monitoring*
6 *systems function as designed*, I cannot say that no reasonable agency could deny Petitioners'
7 request for revocation or modification to pursue alternative technologies at Umatilla.

8 ***Public Views of the Hazards of Continued Storage:*** I was surprised to learn that
9 the agencies had dropped an initial argument for upholding the permits without awaiting the
10 maturization of alternative technologies – the danger of continued storage in light of the risk of
11 earthquake, airplane crash, or (since 9/11) terrorism. It was apparent that through the same
12 process of risk assessment that led the agencies to conclude that anticipated emission releases
13 would be “safe,” the agencies had concluded that public fears of the risk of continued storage
14 were substantially exaggerated. I raised the question with the parties whether the agencies could
15 continue to rely to any extent upon public fears knowing (or believing) them to be exaggerated,
16 but I received no substantial response, and I now conclude that this otherwise interesting question
17 is purely academic for a variety of reasons. First, given the agencies’ exploitation of recent
18 appellate decisions relieving them of the obligation to make findings of fact, I cannot ask and the
19 agencies need not tell me whether they gave any weight to the public’s concerns with storage in
20 denying Petitioners’ request for revocation or modification. Second, the current applicable
21 standard of review requires me to uphold the agencies’ decision if any reasonable agency could
22 agree with the agencies’ *result* on this record viewed as a whole – a standard which makes the

1 agencies' reasoning essentially irrelevant.²⁸ Third, the time limits imposed by treaty²⁹ obligations
2 perform the same function in this analysis as the risk of storage, so the role of public concern in
3 the agencies' analysis is again irrelevant.

4 ***Army "Misrepresentation"*** The Petitioners produced credible evidence from which a
5 reasonable agency *could* conclude that the Army intentionally misled Respondents for years.
6 With respect to the dunnage incinerator (DUN), designed to destroy pallets, DPE suits, and other
7 miscellaneous secondary waste, the evidence could support a conclusion that the Army had
8 already abandoned the DUN³⁰ long before the permit was initially issued but choose to conceal
9 its concerns and decisions from Respondents. Wayne Thomas, as the DEQ Umatilla Chemical
10 Demilitarization Program Director, testified that his first clue that the Army might not use the
11 DUN was encountering a wall in the facility erected in such a way as to impede installation of the
12 DUN. At least at one point, Wayne Thomas had concerns that the Army was not being truthful
13 with him.

14 The Petitioners also produced evidence upon which they argue that the Army exerted
15 pressure to conceal the true toxicity of chemical agents; concealed failures of the Brine
16 Reduction Area (BRA), designed to reduce the brine produced by the incinerator's wet
17 scrubbers,³¹ as part of a sustained tactic to pressure the agencies to allow brine to be shipped off

²⁸ As I suggest above, this standard undermines the actual reliance on agency expertise because I might end up affirming a result the agency would abandon should I find a logical step invalid or contrary to law; the standard also undermines enforcement of legislation prescribing agency conduct.

²⁹ Chemical Weapons Convention, *supra* note 3.

³⁰ The Army identified grossly disappointing DUN throughput rates for wood waste in predecessor facilities as early as 1990, struggled with DUN problems for years, arguably abandoned it by or before 1996, and apparently disclosed to Respondents its intention to replace the DUN for the first time in January 1997.

³¹ "Scrubbers" spray a solution of sodium hydroxide into the hot gasses coming from the incinerators as part of the pollution abatement system.

1 site; and somehow misrepresented material facts relating to problems with carbon filter pollution
2 abatement systems, a mustard thaw system³² and an XRF³³ machine at another facility.

3 A reasonable agency could conclude from the record as a whole, however, that what
4 Petitioners perceive as deception is the product of the combination of several less sinister factors:
5 an arms-length posture of a regulated entity in interaction with regulators; an activity disbursed
6 over several facilities in the United States within a hierarchical and bureaucratic agency
7 responding to multiple regulators and evolving regulations; and an ongoing and complex process
8 for learning from problems in a complicated industrial activity and for pursuing the most
9 acceptable solutions over time. Although any reasonable agency would take meaningful account
10 of these circumstances, that many individuals and communications concerned problems with
11 operations and possible solutions does not compel a finding of misrepresentation. I cannot find
12 that no reasonable agency could decline to revoke or modify the permit based on the Petitioners'
13 contentions concerning misrepresentation by the Army.

14 ***Carbon Filters, DUN replacements, and BRA as unproven technologies:***

15 Petitioners argue that the Intervenors' problems with the carbon filter pollution abatement
16 systems and their plans for removing processing waste through devices other than the DUN and
17 for modifying the use of the BRA all demonstrate that the incineration technology at Umatilla is
18 unproven and therefore require revocation or modification of the existing permit. The record as a
19 whole, however, can reasonably be seen as supporting the Respondents' apparent conclusion to
20 the contrary. Under the applicable standard of review, I cannot conclude that these concerns
21 require modification or revocation of the permit. A reasonable agency could conclude that the

³² Mustard thaw was a process developed to cope with agent that had solidified in storage so that it could be pumped from containers.

³³ The XRF machine is designed to detect and measure metals such as mercury in effluent.

1 carbon filter system problems have been addressed successfully, and that permit modifications
2 added in March of 2002 adding additional requirements regarding treatment of secondary wastes
3 originally aimed for the DUN and a contemplated future modification concerning the remaining
4 spent carbon waste stream will be sufficient to address these issues. Similarly, existing permit
5 conditions require that the Intervenors demonstrate that the BRA is fully operational before they
6 can begin burning agent.

7 Petitioners' contentions concerning the carbon filters, the substitute processes for the
8 functions originally assigned to the DUN, and problems with the BRA do not support a
9 conclusion that no reasonable agency would decline to modify or revoke the permit.

10 *ACAMS, DAAMS, and FTIR:* ACAMS³⁴ monitors are designed to detect and
11 alarm if agent is detected in the stack or other locations in which gasses flow in the incineration
12 process. DAAMS³⁵ monitors detect agent in the stack and at the perimeter of the facility and
13 elsewhere, but are not "continuous" in that agent captured by DAAMS is only apparent upon
14 routine inspection of the contents of the monitors, which essentially capture contaminants for
15 future detection. Both are used to detect and measure agent, but not other contaminants. Some
16 ACAMS monitors are designed to trigger automatic waste feed cutoffs when combustion
17 produces agent at specified levels. Petitioners produced evidence supporting the inference that
18 the ACAMS and DAAMS do not reliably detect agent, that they are not even designed to detect
19 hazardous emissions other than agent, that they respond too slowly to protect the downwind
20 community from releases of contaminants, and that the procedures in place for testing or
21 "challenging" ACAMS in the stack fail to assure that they detect the agent as intended. In

³⁴ Automatic Continuous Air Monitoring System.

³⁵ Depot Area Air Monitoring System.

1 particular, Thomas Cramer credibly testified that the procedures for challenging stack ACAMS at
2 CAMDS³⁶ and TOCDF³⁷ were defective because of the design of ACAMS probes, and that this
3 defect may have been associated with the release of agent into the environment at the Tooele
4 facility in May of 2000. Petitioners also argue from the evidence that the Respondents are
5 inappropriately reliant on the Centers for Disease Control and Prevention in Atlanta (CDC) for
6 oversight and approval of the Intervenor’s agent-monitoring processes and procedures, and that
7 the CDC has not certified that appropriate procedures for using, maintaining, and testing these
8 devices are being correctly followed.

9 The Respondents and Intervenor differ somewhat in their response to these contentions.
10 WDC cites ongoing activities by the Respondents to ensure that monitoring concerns raised by
11 CDC are addressed and that Congressional interest in improved or alternative monitoring
12 technologies be pursued. WDC contends that all of this and the record support the conclusion
13 that the ACAMS and DAAMS systems “with proper attention to detail and certain
14 modifications” “remain the best option for monitoring at these facilities,” that the Respondents
15 are demonstrating responsible attention to these issues, and therefore that the concerns do not call
16 for permit modification or revocation.

17 The Army, on the other hand points to its principal expert’s testimony to argue that the
18 ACAMS and DAAMS monitors are based on good science, have performed as expected by the
19 Army for some time, and “are reasonably expected to function properly.” The Army derogates
20 the Petitioner’s principal witness on these points as “a repair technician,” and notes that it had no

³⁶ Chemical Agent Munition Disposal System, the pilot facility for facilities such as the one here in question, located approximately 12 miles south of Tooele, Utah.

³⁷ Tooele Chemical Agent Disposal Facility, at Tooele, Utah, essentially Umatilla’s sister facility.

1 opportunity to rebut his testimony that challenge procedures were inadequate to test the
2 monitors' ability to detect agent.

3 The Respondents agree with the Army that “ACAMS/DAAMS monitoring systems
4 have been used successfully at other chemical weapons disposal facilities for many years.”
5 Respondents further contend that the existing permit *requires* the permittee “properly [to] operate
6 and maintain” all aspects of the facility, and specifically requires with respect to each of the
7 incinerators that the permittee “maintain, calibrate, and operate process monitoring, control, and
8 recording equipment” within the standards established in the permit and its tables – which
9 expressly prohibit feeding waste if any of the monitoring instruments fail to operate properly.³⁸

10 Although the concerns raised by Petitioners are substantial, and the safety of the plant's
11 operation is heavily dependent upon the proper calibration and functioning of monitoring devices
12 at the facility, under the applicable standard of review and the record viewed as a whole, I am
13 unable to say that no reasonable agency could fail to modify or revoke the permit with respect to
14 ACAMS or DAAMS. The Petitioners argue that it would be “reasonable” for the permit to
15 require that permittees comply with “CDC's review of processes and procedures.” Indeed it
16 would, but the permit already provides ample devices by which to “require” that the permittees
17 comply with any requirements adopted by Respondents after input by CDC, and ample
18 opportunity for Respondents to procure, inform and exploit CDC input. Module VII of the
19 permit already requires that no normal operations begin until the Respondents have 1) evaluated
20 and approved the results of trial burns, 2) concluded that the requirements of Module VI have
21 been met (including the maintenance, calibration and operation of monitoring and control

³⁸ See Exhibit 22 at I.L.1, VII.B.5, VII.C.5, VII.D.5, and tables 7-1 through 7-6.

1 equipment³⁹ – a category that includes ACAMS and DAAMS), and 3) established the standards
2 for emissions⁴⁰ for the monitors and controls whose maintenance, calibration and operation are
3 required in conformance with those standards by Module VII.⁴¹ And Module I gives the
4 Respondents ample mechanisms by which to inspect the facility and extract whatever
5 information it may need to inform the CDC and to exploit the recommendations of the CDC.

6 Petitioners also produced evidence that a technology exists, open-path fourier transform
7 infrared spectrometer technology, or FTIR, by which to provide real-time monitoring of the
8 facility perimeter. Petitioners' witness Donald Gamiles credibly testified that this technology is
9 be capable of providing real-time warning of any accidental substantial release of targeted toxic
10 pollutants. Under the applicable standard of review, however, I cannot say that no reasonable
11 agency could fail to require FTIR because the agency had no opportunity at the time of these
12 proceedings to evaluate FTIR.⁴² Any reasonable agency would certainly evaluate its potential for
13 this facility, but that is not now a basis for permit modification or revocation on this record.

³⁹ Exhibit 22 at VI.B.4,5; VI.C.4,5; VI.D.4,5; VI.E.4,5; VI.F; VI.G.

⁴⁰ Exhibit 22 at VII.A.1 and referenced tables.

⁴¹ Exhibit 22 at VII.A.4; VII.B.5,6; VII.C.5,6; VII.C.5,6; VII.F; VII.G.

⁴² The Respondents ask that I take judicial notice of an exhibit 360, a letter from CDC encouraging consideration of such technologies such as FTIR and other alternative monitoring technologies. The proposed exhibit would make no difference to the outcome at this time in these proceedings, because with or without it I cannot say that no reasonable agency would decline to modify or revoke the permit so as to require FTIR before evaluating it, so I decline judicially to notice the document. The proposed exhibit does, however, provide another example of the difficulty of the applicable standard of review in the absence of findings by an agency. Were an agency to reject FTIR on the basis that it does not detect agent at the minimum levels required for constant monitoring to assure operations within *threshold* emission standards, that would surely be an irrational result – it would make no sense to deprive downwind communities of a real time warning of a catastrophic release solely because the mechanism does not also perform the distinct function of detecting emissions at threshold levels. Without findings, and with input such as proposed exhibit 360, it would be impossible for a reviewing court to assess the rationality of an agency decision – or, therefore, the agency's compliance with applicable law.

1 ***Other Incidents, Touhy and Whistleblowers:***⁴³ Petitioners adduced testimony
2 regarding numerous incidents at other facilities in which hazardous substances were released or
3 suspected to have been released, workers were exposed to hazards, and, according to Petitioners,
4 incidents were repeated because the Army and its TOCDF contractor were “actively hiding
5 lessons learned from [their] own workers” and restricting the ability of workers fully to
6 participate in “Program Lessons Learned” sessions so as to suppress and prevent sharing of safety
7 information. Petitioners present as part of the same problem the incident in this litigation in
8 which the Army invoked *Touhy* regulations⁴⁴ to prevent Thomas Cramer from giving an opinion
9 about the function of stack ACAMS. Petitioners submit that the required remedy is a permit
10 requirement that the Army waive *Touhy*; a modification of the permit prohibiting Army
11 misrepresentations, and providing a sanction of a 20% pay raise and secure future employment
12 for any punished whistleblower; or a sufficiently convincing threat of contempt directed at the
13 Army.⁴⁵

14 The Army responded to this critique by citing evidence that the Army indeed kept track of
15 incidents at other facilities, and by arguing that a federal district court in Utah rejected a
16 contention that the same incidents entitled other petitioners to relief as against the Tooele facility
17 (TOCDF),⁴⁶ that the incidents do not show a “systematic problem that violates RCRA,”⁴⁷ that

⁴³ I combine these topics for reasons which I hope appear from my analysis.

⁴⁴ 32 CFR §§ 516.49, 516.52. *United States ex rel Touhy v. Ragen*, 340 US 462 (1951), generally upholds the right of federal agency heads to restrict employee participation in litigation, and has provided the generic name for regulations of this sort.

⁴⁵ Petitioners’ Post-Trial Brief at 82-83.

⁴⁶ *Chemical Weapons Working Group v. Department of the Army*, 2000 WL 1258380, 51 ERC 1136, 30 Env’tl. L. Rep. 20,519 (D. Utah 2000) [unreported in F Supp 2d].

⁴⁷ Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq* (1976).

1 Petitioners’ evidence is unpersuasive for want of a safety expert or evidence that workers were
2 exposed to agent, that the sole instance suggesting the chilling of communication arose in the
3 context of a “valid” assertion of *Touhy* regulations; that those regulations do not apply to
4 employees wishing to speak with state regulators, and that though an agency might propose such
5 a modification, Petitioners’ have not shown that every rational agency would adopt
6 whistleblower protection.

7 WDC for its part responds that the Petitioners’ parade of incidents is not surprising in a
8 complex industrial operation, that Petitioners have not shown that the Army and WDC have
9 failed to benefit from “lessons learned” at other facilities, that TOCDF is run by a different
10 contractor “with a different safety culture,” that a whistleblower provision is unnecessary because
11 *Touhy* regulations have no application to WDC as a contractor, that “most of the
12 ‘whistleblowers’ who testified in the proceedings before this Court – and the majority of WDC
13 employees at Umatilla” are not subject to those regulations, that those regulations seem limited to
14 testimony in litigation, that there is no evidence that any whistleblower in fact suffered adverse
15 consequences, and that “a substantial majority” of employees feel comfortable raising safety and
16 hazard concerns “with their supervisors.”

17 Respondents contend that evidence of failures and incidents at TOCDF and other
18 facilities, “while cause for alarm,” was in part explained or refuted by the Army’s witnesses; has
19 been insufficient to convince federal courts in Utah of serious threats to public health and
20 safety;⁴⁸ has led to improvements under the Army’s “lessons learned” program; and does not
21 compel a reasonable agency to conclude “that operation of UMCDF under the conditions

⁴⁸ *Chemical Weapons Working Group, Inc. v. U.S. Dept. Of Army*, 935 F Supp 1206 (D Utah), *affirmed* 101 F3d 1360 (10th Cir 1996), and 963 F Supp 1083 (D Utah 1997).

1 specified in the permit (enforced by DEQ) will endanger public health or safety in any respect.”
2 Respondents contend that this Court “ultimately found” that “the Army was legally entitled to
3 seek to prevent Thomas Cramer from offering opinion testimony against the Army in this case”;
4 that his opinion was obvious though unstated; that Respondents “based their regulatory decisions
5 primarily on their own investigations, the analyses performed by state officials and others,
6 scientific studies and other evidence – including whistleblower reports – received by the agencies
7 *outside* these court proceedings”; that *Touhy* regulations have no application even to Army
8 employees not presenting testimony in a court; that federal law protects all whistleblowers; that a
9 permit modification would therefore offer no further protection; and that a modification to
10 require whistleblower protection is beyond the subject matter of this court because not requested
11 in the petition for judicial review filed in this case.

12 By tradition, I address subject matter jurisdiction first. Respondent’s sole authority for
13 the contention that I lack subject matter jurisdiction is ORS 183.484(1) and (2), which provide
14 that jurisdiction is conferred by filing a petition for review, and that the petition “shall state . . .
15 the ground or grounds upon which the petitioner contends the order should be reversed or
16 remanded.” Respondents’ jurisdictional assertion is unpersuasive.

17 The petition in this case contains ample allegations to support subject matter jurisdiction.
18 Petitioners contend that Respondents’ “findings or conclusion . . . that there is insufficient
19 evidence to warrant a unilateral modification or revocation of the UMCDF hazardous waste
20 permit [are] not supported by substantial evidence” and violates applicable law (§46); that
21 Respondents have violated applicable law “by failing to set permit conditions necessary to
22 protect public health and the environment” (§47); that Respondents have violated applicable law
23 “by failing to establish . . . post-trial burn operating requirements that are adequately protective

1 of public health and the environment” (§52); that Respondents have violated applicable law by
2 “failing to establish adequate emergency procedures and safeguards necessary to prevent
3 accidents and reasonably foreseeable risks” (§62); and that Respondents “cannot establish permit
4 conditions that will adequately protect human health and the environment” as required by
5 applicable law, in that, for example, “the emission standards or limits established in the Permits
6 for the chemical warfare agents VX, GB (Sarin), and HD (Mustard) cannot be timely and
7 accurately detected, quantified, and/or monitored by” the ACAMS (§64). The Petition requests
8 that the permits issued by respondent be adjudged unlawful and vacated (§68); that the Permits
9 be remanded to the agencies with an Order compelling them to fully comply with the legal
10 requirements determined by the court before seeking to reissue the Permits (§70); and that this
11 court afford “such other relief as the Court may deem just and appropriate.”

12 ORS 183.484 (5) provides that this court “shall set aside or remand the order if it finds
13 that the order is not supported by substantial evidence in the record.” I clearly have subject
14 matter jurisdiction to consider whether the known fallibility of the ACAMS and DAAMS, their
15 critical role in assuring safe operations, their lack of routine inspection to ensure calibration and
16 performance in conformance with permit conditions, the lack of a real-time perimeter monitoring
17 system, the lack of a transparent relationship between the permittees and the Respondents, and
18 related concerns apparent from this record, together render the existing permit conditions
19 insufficient to protect health and the environment, so as to require a remand to Respondents with
20 a direction to modify the permit to adopt appropriate whistleblower protections as a “procedure”
21 and as relief necessary to prevent accidents and foreseeable risks and to achieve compliance with
22 Respondents’ legal responsibilities to protect public and worker health and safety and the
23 environment.

1 With respect to the substantive contentions of the parties, the miscommunication
2 evidenced by Respondents' contention that I "ultimately found" that "the Army was legally
3 entitled to seek to prevent Thomas Cramer from offering opinion testimony" and the Army's
4 suggestion that I found its *Touhy* objection "valid" is as extreme as I have encountered in my
5 years on the bench. In my OPINION AND ORDER on PETITIONERS' MOTION FOR
6 SANCTIONS, I addressed Petitioners' contentions that the Army's use of *Touhy* regulations was
7 unlawful in light of the superior force of federal statutes protecting whistleblowers in the context
8 of RCRA:

9 Although the Army's initial, repeated, and persisting assertion of a
10 right to prevent testimony by any employee in these proceedings
11 raises serious questions about the respondents' ability to ensure
12 public safety during the proposed operation of the demilitarization
13 incineration facility at Umatilla subject of these proceedings, and
14 although the assertion of the Army's position in terms of a witness
15 "put[ting] his head on a chopping block" was unfortunately
16 zealous, I cannot find misconduct on the part of the Army's
17 counsel. As argued by that counsel, the *Touhy* regulations cited
18 (32 CFR §§ 516.49, 516.52) and the related EIGA regulations (5
19 CFR §2635.805) have been repeatedly upheld as valid limitations
20 on the ability of federal employees to participate in litigation other
21 than in support of their employers, and as based on sound policy
22 considerations. **I did rule, and continue to hold, that in the**
23 **context of the facility here in question, the relevant "whistle**
24 **blower" statute, 42 USC §6971, trumps any attempt by the**
25 **Army to invoke its regulations (or EIGA regulations) to**
26 **prevent an employee from providing fact or expert testimony**
27 **in these proceedings or in proceedings before the respondent**
28 **state agencies.** The public function of the whistle blower statute is
29 to ensure that those with the most direct access to knowledge of a
30 relevant hazard not be convinced by intimidation not to share that
31 knowledge with those in position to avoid or minimize that hazard.
32 That a hazard may not yet have yielded disaster but is predictable
33 only through expert opinion hardly escapes the purpose of that
34 function.

35
36
37 OPINION AND ORDER on PETITIONERS' MOTION FOR
SANCTIONS at 3 (March 1, 2004). [footnotes omitted, emphasis
added]

1 My reasoning was that although the Army's use of *Touhy* regulations *was* invalid in light
2 of the RCRA whistleblower statute, that use did not rise to *misconduct* warranting sanctions:

3 No misconduct occurred here. Carefully read, the Army's letter
4 response to petitioners' request for permission for Mr. Cramer to
5 testify stops far short of threatening criminal liability; rather, it
6 invokes criminal statutes (18 USC §§ 205, 207) as support for the
7 *Touhy* regulations here invoked, a support which though hardly
8 literal is nonetheless recognized by judicial opinions in the federal
9 courts. The Army had no opportunity to litigate its refusal to
10 consent to expert opinion testimony before Mr. Cramer was on the
11 stand because the petitioners did not alert the Army that they would
12 seek such testimony notwithstanding limitation of consent in that
13 letter to fact testimony. The Army's position was not repeated to
14 Mr. Cramer after **I concluded** – in Mr. Cramer's absence from the
15 courtroom – **that the whistle blower statute makes any attempt**
16 **to retaliate against him for testimony, even expert testimony,**
17 **unlawful regardless of the regulations.** It was my explanation of
18 the limitation of a state court's power to shield Mr. Cramer from
19 such retaliation that apparently contributed to his final decision not
20 to give expert testimony.

21 *Id.*, at 3 (emphasis added).

23 My findings were not particularly ambiguous:

- 25 1. The Army and its counsel committed no misconduct in
26 asserting the *Touhy* regulations in an attempt to prevent Mr.
27 Cramer's opinion testimony.
- 28 2. Any attempt to retaliate against Mr. Cramer from [*sic*; for]
29 providing or offering fact or opinion testimony in this
30 proceeding **would be unlawful and in violation of 42**
31 **USC §6971.**
- 32 3. Should Mr. Cramer perceive any threat of retaliation, he
33 may apply directly or through petitioners for relief from this
34 court, but this court has not decided what, if any, relief may
35 be available.

37 *Id.*, at 5 (emphasis added)

39 The Respondents and the Army *still* persist in an invalid assertion that *Touhy* regulations
40 can be asserted in the context of a facility subject to RCRA notwithstanding federal statutory law

1 directly to the contrary, and repeat their astonishing assertion that this court agrees with them.⁴⁹

2 Though both concede that *Touhy* regulations do not apply to “most” WDC employees at UMCDF
3 and do not restrict conveying information to regulators outside litigation, their continued
4 persistence exacerbates the “serious questions about the respondents’ ability to ensure public
5 safety during the proposed operation of the demilitarization incineration facility at Umatilla.”
6 Their continued persistence also substantially undermines the force of their argument that the
7 *Touhy* regulations have no tendency to deter workers from alerting regulators to dangers, or to
8 affect “most” of WDC workers who are not employed by the Army. After all, if they have
9 repeated difficulty understanding that *Touhy* regulations cannot lawfully apply at all to a RCRA
10 facility, it is not altogether reassuring that the regulations by their terms also do not apply to non-
11 Army employees or to opinions expressed other than through court testimony.

12 On the other hand, these concessions – that *Touhy* regulations do not regulate workers
13 conveying information to regulators out of court – should alleviate any concern that a reasonable
14 agency might otherwise have that permit protection for whistleblowers would conflict with any
15 lawful or legitimate interest of the permittees.

16 Congress has recognized that in the context of RCRA facilities such as UMCDF, the
17 function of whistleblowers may be so important to public safety that that function is entitled to
18 the protection of federal law, and thereby exempt from unenthusiastic “safety cultures,” *Touhy*
19 regulations, and other circumstances of the workplace that might discourage the use of the

⁴⁹ I hasten to add that my concern has nothing to do with the parties’ deference to this court’s authority, legal analysis or prior rulings. That they continue to insist that the Army can apply *Touhy* regulations to a RCRA facility at all, and display an astounding inability to understand that at least this court has expressly held to the contrary, combine to exude alarming implications for at least one co-permittee’s “safety culture” in the context of a facility whose safety is critically dependent on agent monitors whose *regular* inspection and scrutiny can only come from the workers who use, calibrate, and observe them.

1 workforce as the first line of protection against the hazards inherent in such a complicated and
2 dangerous undertaking:

3 No person shall fire, or in any other way discriminate against, or
4 cause to be fired or discriminated against, any employee or any
5 authorized representative of employees by reason of the fact that
6 such employee or representative has filed, instituted, or caused to
7 be filed or instituted any proceeding under this chapter or under
8 any applicable implementation plan, or has testified or is about to
9 testify in any proceeding resulting from the administration or
10 enforcement of the provisions of this chapter or of any applicable
11 implementation plan.

13 42 USC §6971(a)

15 Of course, as Respondents and Intervenors argue, that federal law protects whistleblowers
16 does not itself compel the inclusion of a similar protection in the permit here in question, and
17 even may suggest that such a provision would be surplusage. But several factors combine to
18 persuade me that no reasonable agency would fail to include such a provision in this permit. To
19 avoid repetition, I will set out my reasoning as findings of fact and conclusions of law as required
20 by ORS 183.484, indicating “all aspects in which the agency’s order is erroneous,” based on the
21 record viewed as a whole and under the applicable standard of review:

22 **Findings of Fact**

- 23 1. A reasonable agency could find that UMCDF can operate in a manner adequately
24 consistent with health and safety and the protection of the environment *if* the facility
25 operates consistently with the requirements of the permit as refined in light of trial burns;
- 26 2. A reasonable agency could find that requirements of the permit as refined in light of trial
27 burns are sufficient to protect health, safety and the environment *if* the operation of the
28 facility and the permittees fully adhere to those requirements;

- 1 3. The *actual* safe operation of the facility is dependent on the experience gained in test
2 burns and whatever mechanisms exist to ensure that the facility operates thereafter in
3 conformance with permit conditions. The performance of ACAMS and DAAMS as
4 designed and intended is critical to operation of the facility in accordance with those
5 conditions, at least as to the release of agent. The safety of the facility’s operations
6 depends upon these devices to test locations within the facility in which chemical agents
7 are handled, the stack gasses, the carbon filters, and (as to DAAMS only) the perimeter
8 for evidence of agent being released so as to endanger workers, the public and the
9 environment;
- 10 4. ACAMS and DAAMS can work as intended, but any reasonable agency must conclude
11 on this record that these devices and the procedures upon which they depend for
12 successful operation are fallible; Respondents have ongoing concerns with them;
- 13 5. There is no regular inspection or other mechanism conducted by Respondents or any
14 outside agency to assure that ACAMS and DAAMS are in fact maintained and calibrated
15 so as to function according to permit requirements. It is entirely possible that the
16 ACAMS and DAAMS may fail to function as intended even when operators believe them
17 properly calibrated and maintained;
- 18 6. Readings of ACAMS indicating the presence of agent can be dismissed and not come to
19 the attention of or be of concern to Respondents because not confirmed by DAAMS and
20 deemed “false positives,” when that determination can itself be erroneous;
- 21 7. Respondents are heavily dependent on the CDC for assurance of the safe and correct
22 calibration, maintenance and operation of the ACAMS and DAAMS monitors, yet the
23 CDC maintains no regular inspection schedule and no presence at the facility to

1 determine that the monitors in fact function as required to protect health, safety and the
2 environment;

3 8. The permit does not require real-time perimeter monitoring or any other device or process
4 to alert anyone of releases of agent or other hazardous substances if the known fallibilities
5 of the ACAMS and DAAMS system materialize and agent escapes without triggering an
6 ACAMS alarm, even in the event of an accidental release at catastrophic levels;

7 9. Although a reasonable agency could conclude (as Respondents presumably⁵⁰ have) that
8 the Army was not guilty of any misrepresentation, any reasonable agency would conclude
9 that the Army's relationship with the Respondents as regulators reflects a profound lack
10 of transparency with respect to its plans for the DUN and its tactics in pursuing solutions
11 to the BRA, and a notable level of denial concerning the status of *Touhy* regulations in
12 the context of a RCRA facility;

13 10. Although Congress has recognized the importance of the function of "whistleblowers" in
14 a facility such as RCRA notwithstanding the inconvenience and administrative
15 difficulties the unstructured articulation of worker concerns can present to management,
16 any reasonable agency would conclude that the mere existence of a federal whistleblower
17 statute has not been sufficient to ensure the full participation of chemical weapons
18 demilitarization workers in protecting health, safety and the environment;

19 11. Any reasonable agency would conclude from concerns expressed in the record that the
20 Army discouraged and screened disclosures in "lessons learned" sessions at other

⁵⁰ As Respondents and Intervenor repeatedly urge, a finding of misrepresentation would not *require* revocation or modification of the permit, but would merely provide grounds for a discretionary decision by the agencies to revoke or modify the permit. Since Respondents have exploited their ability under present law not to make specific findings or conclusions, I cannot tell with certainty whether the Respondents have found no misrepresentation or have found misrepresentation but concluded it insufficient to warrant revocation or modification.

1 facilities that the Respondents cannot depend with any acceptable level of security that
2 every legitimate safety concern raised by a worker would come to their attention;

3 12. Any reasonable agency would conclude that a substantial minority of workers do not feel
4 comfortable raising such concerns *even* with their supervisors, and that it is at least
5 entirely likely that the proportion of workers who feel uncomfortable complaining *beyond*
6 their supervisors and even to an outside regulator is substantial;

7 13. Any reasonable agency would have to conclude that workers are often best positioned to
8 observe a hazardous condition or circumstance in the first instance;

9 14. Information from workers, including whistleblowers, about hazards and incidents have
10 been helpful to the Respondents in the past;

11 15. Any reasonable agency would conclude that meaningfully encouraging workers to report
12 good faith concerns for safety, hazards, and related noncompliance with permit conditions
13 would represent a substantial safety function that would significantly supplement permit
14 requirements and existing investigation, report and investigation functions contemplated
15 by the permit, and would provide an incremental and substantial measure of protection
16 that is presently absent from the permit and not afforded by the mere existence of a
17 federal whistleblower statute;

18 16. The Army has disavowed any conflict between *Touhy* regulations and workers expressing
19 concerns to Respondents (other than through testimony in court);

20 17. WDC has disavowed any application of *Touhy* regulations to most WDC employees and
21 to any communication outside litigation; and

22 18. No reasonable agency charged with protection of health, safety and the environment
23 would fail to require the permittees prominently a) to advise workers of their obligation to

1 report good faith concerns regarding the safety of workers, the public, or the environment,
2 and related noncompliance with permit requirements, b) to notify workers of their
3 obligation to convey such concerns to Respondents if those concerns are not otherwise
4 sufficiently resolved, and c) to assure all workers that they will not be disadvantaged in
5 any way by communicating such concerns in good faith.

6 **Conclusions of Law:**

- 7 1. 42 USC §6971 prevents any application of *Touhy* regulations (32 CFR §§ 516.49,
8 516.52), or EIGA regulations (5 CFR §2635.805), so as to deter or punish any good faith
9 attempt by facility workers to communicate to the Respondents concerns regarding the
10 safety of the facility or its compliance with permit conditions;
- 11 2. Without the addition of whistleblower functions, the permitted activity endangers human
12 health and the environment and can only be regulated to acceptable levels by modification
13 of the permit to require the permittees prominently a) to advise workers of their
14 obligation to report good faith concerns regarding the safety of workers, the public, or the
15 environment, and related noncompliance with permit requirements, b) to notify workers
16 of their obligation to convey such concerns to Respondents if those concerns are not
17 otherwise sufficiently resolved, and c) to assure all workers that they will not be
18 disadvantaged in any way by communicating such concerns in good faith;
- 19 3. To this extent only, the Respondents' order declining Petitioners' request for permit
20 modification or revocation is not supported by substantial evidence in the record.

21 //

1 Accordingly, it is hereby ORDERED that the Order of Respondents denying the Petition
2 for revocation or modification of the UMCDF permit is remanded to Respondents for further
3 proceedings consistent with this Opinion and Order.

4

5

6 July 26, 2004


Michael H. Marcus, Judge