OhioEPA
State of Ohio Environmental Protection Agency

STREET ADDRESS:
Lazarus Government Center
50 W. Town St., Suite 700
Columbus, Ohio 43215

TELE: (614) 644-3020 FAX: (614) 644-3184
www.epa.state.oh.us

MAILING ADDRESS:
P.O. Box 1049
Columbus, OH 43216-1049

October 21, 2009

Re: Ross Incineration Services, Inc.
Permit Modification
OHD 048 415 665

Ms. Patricia Lawson
Ross Incineration Services, Inc.
150 Innovation Drive
Elyria, Ohio 44035

Dear Ms. Lawson:

On March 4, 2009, Ohio EPA issued a draft Permit modification to Ross Incineration Services, Inc., to incorporate the Ross Transportation Services, Inc.'s (RTS) 10-day transfer storage activities into Ross Incineration Services, Inc.'s Permit as a hazardous waste container storage unit. The Permit modification was initiated by Ohio EPA. I have enclosed a copy of the responsiveness summary Ohio EPA prepared in response to written comments the Agency received concerning the permit modification. I have also enclosed the final modified Ohio hazardous waste facility installation and operation permit (Permit) that was issued by the Director today. Please note that the modified Permit remains in effect until it is renewed, withdrawn, suspended or revoked.

You are hereby notified that this action of the Director is final and may be appealed to the Environmental Review Appeals Commission pursuant to Section 3745.04 of the Ohio Revised Code. The appeal must be in writing and set forth the action complained of and the grounds upon which the appeal is based. The appeal must be filed with the Commission within thirty (30) days after notice of the Director's action. The appeal must be accompanied by a filing fee of $70.00 which the Commission, in its discretion, may reduce if by affidavit you demonstrate that payment of the full amount of the fee would cause extreme hardship. Notice of the filing of the appeal shall be filed with the Director within three (3) days of filing with the Commission. Ohio EPA requests that a copy of the appeal be served upon the Ohio Attorney General's Office, Environmental Enforcement Section. An appeal may be filed with the Environmental Review Appeals Commission at the following address:

Environmental Review Appeals Commission
309 South Fourth Street, Room 222
Columbus, OH 43215

If you have any questions, please contact Ed Lim of Ohio EPA's Central Office at (614) 644-2824.

Sincerely,

Jeremy A. Carroll, P.E.
Manager, Regulatory and Information Services Section
Division of Hazardous Waste Management

RossAgencyInitiatedModRossFinalcovltr10'09.doc

cc: Ed Lim/Pam McCoy, Manager, ERAS, DHWM, CO
Dale Meyer, US EPA, Region 5
Natalie Oryshkewych/Neil Wasilk, DHWM, NEDO
Carol Hester, PIC, Ohio EPA
file

PUBLIC NOTICE

Lorain County

OHIO EPA ISSUES FINAL HAZARDOUS WASTE PERMIT MODIFICATION

On October 21, 2009, Ohio EPA issued a final modification to the Hazardous Waste Facility Installation and Operation Permit (Permit) for Ross Incineration Services, Inc. for its facility located at 36790 Giles Road, Grafton, Ohio 44044. The EPA Identification Number for this facility is OHD048415665.

Why does Ross Incineration Services, Inc. need this Permit modification?

Ross Incineration Services, Inc. (RIS) is permitted to operate a hazardous waste incinerator and other related hazardous waste management units at its facility. The Director of Ohio EPA is initiating this final modification to incorporate the Ross Transportation Services, Inc. (RTS) 10-day transfer storage activities into RIS's permit as a hazardous waste container storage unit. Hazardous waste transporters are regulated under OAC Chapter 3475-53 (Transporter Standards). Under the rules of this chapter, a transporter is not required to obtain a hazardous waste permit. However, these standards are no longer applicable once the waste is no longer in the "normal course of transportation." Waste destined for RIS ceases transportation when it arrives at RTS since both entities are located on contiguous property. Therefore, RTS and its hazardous waste management activities are subject to the hazardous waste permitting requirements. This final Permit modification contains the conditions under which the facility must operate.

Can I appeal this modified permit?

Yes, if you are an officer of an agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected by this Permit, you have the right to appeal this permit decision to the Environmental Review Appeals Commission (ERAC).

If I decide to appeal this final modified Permit, how and when must I make the appeal?

If you file an appeal, you must put it in writing no later than November 23, 2009. Your appeal must explain why you are appealing the action and the grounds you are using for your appeal. The appeal must be accompanied by a filing fee of $70.00 which the Commission, in its discretion, may reduce if by affidavit you demonstrate that payment of the full amount of the fee would cause extreme hardship. Ohio EPA requests that a copy of the appeal be served upon the Ohio Attorney General's Office, Environmental Enforcement Section. You must file your appeal, according to Ohio Revised Code § 3745.04 with ERAC at the following address: ***Environmental Review Appeals Commission***, 309 South Fourth Street, Room 222, Columbus, Ohio 43215. You must send a copy of the appeal to the director of Ohio EPA at the following address no later than three (3) days after you file it with ERAC: ***Chris Korleski, Director of Ohio EPA***, P.O. Box 1049, Columbus, Ohio 43216-1049.

OHIO E.P.A.

OCT 21 2009

ENTERED DIRECTOR'S JOURNAL

OHIO ENVIRONMENTAL PROTECTION AGENCY

MODIFIED OHIO HAZARDOUS WASTE FACILITY INSTALLATION AND OPERATION PERMIT

Date of Issuance: October 21, 2009
Effective Date: October 21, 2009

U.S. EPA ID No.: OHD 048 415 665
Ohio Permit No.: 02-47-0295

Name of Permittee: Ross Incineration Services, Inc.

Mailing Address: 150 Innovation Drive
Elyria, OH 44035

Facility Location: 36790 Giles Road
Grafton, OH 44044

Person to Contact: Patricia Lawson

This Modified Ohio Hazardous Waste Facility Installation and Operation Permit is issued pursuant and subject to Section 3734.05(I) of the Ohio Revised Code and Rule 3745-50-51(J) of the Ohio Administrative Code.

The Ohio Hazardous Waste Facility Installation and Operation Permit with the above-referenced permit number as issued by the Ohio Environmental Protection Agency and journalized on September 30, 2003, is hereby incorporated by reference in its entirety, except as it may be modified herein.

This modification of the permit shall remain in effect until such time as the Ohio Hazardous Waste Facility Installation and Operation Permit is renewed, modified, withdrawn, suspended or revoked.

The modified Terms and Conditions of this permit are attached hereto and are incorporated herein by reference. The modified Terms and Conditions supersede and replace the corresponding pages found in the September 30, 2003 renewal permit.

Chris Korleski
Director

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

By: Lessiter Date: 10-21-09

OHIO EPA DHWM

OCT 21 2009

OHIO ENVIRONMENTAL PROTECTION AGENCY

OHIO HAZARDOUS WASTE FACILITY INSTALLATION AND OPERATION PERMIT RENEWAL

Permittee: Ross Incineration Services, Inc.

U.S. EPA ID:	OHD 048 415 665
Issue Date:	09/ 30/ 03
Effective Date:	09/ 30/ 03
Expiration Date:	09/ 30/ 13

Mailing Address: Ross Incineration Services, Inc.
150 Innovation Drive
Elyria, OH 44035

Owner: Ross Incineration Services, Inc.
36790 Giles Road
Grafton, OH 44044

Ross Consolidated Corp.
36790 Giles Road
Grafton, OH 44044

Operator: Ross Incineration Services, Inc.
36790 Giles Road
Grafton, OH 44044

Ross Transportation Services, Inc.
36790 Giles Road
Grafton, OH 44044

Location: Ross Incineration Services, Inc.
36790 Giles Road
Grafton, OH 44044

AUTHORIZED ACTIVITIES

In reference to the application of Ross Incineration Services, Inc. for an Ohio Hazardous Waste Facility Installation and Operation Renewal Permit under Ohio Revised Code (ORC) Chapter 3734 and the record in this matter, you are authorized to conduct at the above-named facility the following hazardous waste management activities:

- **Incineration of hazardous waste;**
- **Storage of hazardous waste in containers;**
- **Storage of hazardous waste in tanks;**
- **Treatment of hazardous waste in tanks;**
- **Treatment of hazardous waste in a filter press;**
- **Closure;**
- **Post-Closure;**
- **Corrective Action**

OHIO EPA DHWM

OCT 21 2009

MODULE C - CONTAINERS STORAGE & MANAGEMENT

C. MODULE HIGHLIGHTS

Containers of hazardous waste are stored in the 1) Bulk Storage Area (BSA), 2) Oxidizer Storage Building (OSB), 3) RTS Transfer Storage Area and 4) Container Storage Facility.

The BSA is outdoors on concrete containment with approximate dimensions of 51' X 99' and used for storage of hazardous waste without free liquids in roll-offs and other containers. It can store the equivalent of 16 twenty cubic yard roll-offs (i.e., 64,632 gallons).

The OSB is a 21' X 80' pre-engineered steel building used to store containers of oxidizer and organic peroxide waste, in addition to the permitted oxidizer waste storage in the CSF. The OSB is designed to hold 144 fifty-five gallon drums (i.e., 7,920 gallons).

The Transfer Storage Area is outdoors in the southeast portion of the facility. Containerized waste destined for Ross Incineration Services, Inc. historically has been stored at the Transfer Storage Area in truck tankers, roll-offs and semi trailers.

The Container Storage Facility is an open-sided covered building with dimensions of approximately 257 feet by 60 feet that is used for storage of containers of wastes from off-site generators and certain on-site generated wastes. Containers stored in the Container Storage Facility include various types of steel, plastic and composite drums, pails, buckets and boxes as well as bulk containers such as roll-offs and truck tankers. Containers with and without free liquids may be stored in the Container Storage Facility. The Container Storage Facility has adequate secondary containment.

Typical hazardous waste types received at the facility in containers include: halogenated and non-halogenated spent solvents, paint wastes, off-specification commercial chemical products and spill residues. Waste generated at the facility and stored in containers consists primarily of treatment residuals from the incineration process.

The Container Storage Facility includes 18 separate storage bays. Containers accepted from off-site generators for storage in the Container Storage Facility must meet the US-DOT specifications found in 49 CFR 178. Non-bulk containers such as drums, pails, buckets and boxes are stored in racks. Bulk containers, such as roll-offs and truck tankers, are stored in the tanker bays in the Container Storage

Facility. Drums, pails, buckets and boxes, subject to waste type and quantity restrictions, may also be stored in the tanker bays in the Container Storage Facility.

Containers of hazardous waste may be accepted for storage and re-shipment to other hazardous waste treatment, storage and disposal facilities. The wastes in re-shipped containers typically carry waste codes that the facility is permitted to store, but not to incinerate.

Containers of hazardous waste may be repackaged at designated locations within the facility into alternate containers to facilitate management of the waste. Liquid wastes received in tanker trucks may be transferred to tankers operated by the facility (i.e., yard tankers) for direct feeding from a tanker into the incinerator.

C.1 Process Capacity/Annual Quantity Limitation
OAC Rules 3745-50-43(A)(7)

(a) The Permittee shall not store more than 457,031 gallons of containerized waste at any given time in the permitted container areas (Container Storage Facility, Bulk Storage Area, and Oxidizer Storage Building). At no time shall the volume of waste exceed 64,632 gallons in the Bulk Storage Area or 7,920 gallons in the Oxidizer Storage Area. The Permittee is prohibited from storing hazardous waste destined for Ross Incineration Services, Inc. in the Transfer Storage Area until acknowledgment or approval, whichever is appropriate, of the permit modification submitted pursuant to Condition C.13. Upon acknowledgment or approval, whichever is appropriate, of the permit modification submitted pursuant to Condition C.13, the Permittee must not store more than the authorized volume of containerized waste at any given time in the Transfer Storage Area and must conduct storage only in accordance with the acknowledged or approved permit modification. The Permittee shall store hazardous waste in the types of containers (size and type) described in Section D of the Part B permit application. The Permittee may not store containers for more than one year.

(b) The Permittee shall at all times have access to its current container storage volume via its computer tracking system and be able to demonstrate compliance with its permitted container storage capacity limitation.

(c) Permit Conditions C.1(a) and C.2 shall not apply to the Permittee's activities as a generator accumulating hazardous waste on-site in compliance with OAC Rule 3745-52-34(A).

However, when accumulating waste within the permitted container storage area, in accordance with OAC Rule 3745-52-34(A), the Permittee shall not,

OHIO EPA DHWM

OCT 21 2009

for the total amount of hazardous waste stored and accumulated, exceed the maximum container storage inventory established under this Condition.

(d) The Permittee shall not treat wastes in containers, except by processing in the incineration unit.

(e) The Permittee may receive and store wastes in containers without intending to treat said wastes. The Permittee may ship these wastes to another permitted facility for treatment, storage or disposal. The Permittee will handle said wastes in accordance with the practices and procedures in Sections C and D of the Part B permit application.

C.2 Waste Identification
ORC Sections 3734.02(F) and 3734.05(H) and OAC Rule 3745-50-43

The Permittee shall store in containers only the hazardous waste codes specified with process code SO1 in Section A of the Part B permit application. The Permittee is prohibited from storing wastes in containers inconsistent with the restrictions and prohibitions in Table C1-1 of Section C of the Part B permit application.

C.3 Condition of Containers
OAC Rule 3745-55-71

If a container holding hazardous waste is not in good condition (e.g., severe rusting, apparent structural defects) or if it begins to leak, the Permittee shall transfer the hazardous waste from such container to a container that is in good condition or otherwise manage the waste in compliance with Sections D and F of the Part B permit application, the conditions of this Permit or the hazardous waste facility chapters of the OAC.

C.4 Compatibility of Waste with Containers
OAC Rule 3745-55-72

The Permittee shall use containers that are compatible with the hazardous waste to be stored.

C.5 Management of Containers
OAC Rule 3745-55-73

(a) All container storage shall be conducted within the container storage units as described in Condition C.1. of this permit and Section D of the Part B permit application.

(b) The Permittee shall keep all containers closed during storage, except when it is necessary to add or remove waste, and shall not open, handle, or store containers in a manner which may rupture the container or cause it to leak.

(c) Lab-pack wastes received at the facility shall be handled in compliance with applicable storage requirements and Sections C and D of the Part B permit application.

(d) The Permittee shall conduct the following container management activities in accordance with the procedures and practices specified in Section D of the Part B permit application: container storage and receiving, repackaging of wastes, transportation of wastes through the facility and special handling of containers. Repackaging of wastes may only be conducted in the following areas:

(i) All concrete areas surrounding the incinerator;

(ii) Concrete pad west of the old process dock;

(iii) Concrete pads east or west of the process dock;

(iv) Concrete pad at the staging areas in the Container Storage Facility;

(v) The concrete loading/unloading area by the closed loop scrubber water system;

(vi) The concrete loading / unloading area by and in the Caustic Building;

(vii) Repackaging room;

(viii) Within the Process Dock Building.

C.6 Containment Systems
OAC Rule 3745-55-75 and ORC Section 3734.05(H)

(a) The Permittee shall maintain the containment systems in accordance with the plans and specifications contained in Section D of the Part B permit application.

(b) The Permittee shall maintain the containment systems as described in the Part B permit application, designed with sufficient capacity to contain ten percent of the total volume of the containers or the volume of the largest container, whichever is greater. The containment systems shall be free of cracks and gaps and sufficiently impervious to contain leaks and spills and

OHIO EPA DHWM

OCT 21 2009

accumulated precipitation until the collected material is detected and removed.

(c) Spilled or leaked waste and accumulated precipitation shall be removed from the sump or collection areas in a timely manner and in accordance with the procedures and practices specified in Section D of the Part B permit application.

(d) No hazardous wastes with free liquids shall be stored in the Bulk Storage Area.

C.7 Reserved

C.8 Inspection Schedules and Procedures
OAC Rules 3745-54-15 and 3745-54-73

As required by OAC Rule 3745-54-15, the Permittee shall inspect the container storage areas in accordance with the inspection schedule contained in Section F of the Part B permit application to detect leaking containers and deterioration of containers and the containment systems caused by corrosion or other factors. The Permittee shall note the results of these inspections in the inspection log along with any remedial action taken in accordance with the procedures contained in Section F of the Part B permit application. Each container in storage for six months or more shall be inspected and stored in accordance with Section F-2b(1) of the Part B permit application and the inspection results shall be recorded in the facility operating record.

C.9 Recordkeeping
OAC Rule 3745-54-73

The Permittee shall comply with all recordkeeping requirements of OAC Rule 3745-54-73 as part of the facility operating record and any other documentation showing compliance with the requirements of permit Condition C.13. and OAC Rules 3745-54-17(B) and 3745-55-77.

C.10 Special Container Provisions for Ignitable or Reactive Waste
OAC Rules 3745-54-17 and 3745-55-76

(a) The Permittee shall not locate containers holding ignitable or reactive waste within 15 meters (50 feet) of the facility's property line.

OHIO EPA DHWM

OCT 21 2009

(b) The Permittee shall take precautions to prevent accidental ignition or reaction of ignitable or reactive waste and shall follow the storage procedures and practices specified in Sections C, D and F of the Part B permit application.

C.11 Special Container Provisions for Incompatible Waste
OAC Rules 3745-55-77 and 3745-54-17

(a) The Permittee shall not store incompatible waste except in accordance with OAC Rules 3745-54-17(B) and 3745-55-77.

(b) The Permittee shall not place hazardous waste in an unwashed container that previously held an incompatible waste or material.

(c) The Permittee shall separate containers of incompatible wastes from each other and from other incompatible materials in accordance with the procedures and practices specified in Sections C, D and F of the Part B permit application.

(d) Only oxidizer and organic peroxide wastes shall be stored in the Oxidizer Storage Building. Such storage shall be in accordance with the procedures and practices specified in Section D of the Part B permit application.

C.12 Reserved.

C.13 Compliance Schedule
OAC Rules 3745-50-50 and 3745-50-51

The Permittee is not authorized to operate the Transfer Storage Area as a hazardous waste storage unit until a Class 1 permit modification, containing the information listed in this Condition has been acknowledged by Ohio EPA, or if as an alternative to submitting a Class 1 permit modification, the Permittee elects to follow the procedures in paragraph (D)(2) of OAC Rule 3745-50-51 for Class 2 modifications in lieu of submitting a Class 1 permit modification, in which case the Permittee is not authorized to operate the Transfer Storage Area as a hazardous waste storage unit until a Class 2 permit modification authorizing such activity has been approved by Ohio EPA. Prior to submittal of the permit modification, the Permittee will submit to Ohio EPA for review the following information:

(a) Modified Part A permit application that includes the Transfer Storage Area as a permitted container storage unit and Ross Transportation Services, Inc. as a facility operator.

(b) Modified Part B permit application that includes the information identified in OAC Rule 3745-50-44 to document how the Transfer Storage Area complies with the container storage requirements of OAC Rules 3745-55-70 to 3745-55-78 and, as applicable, the general facility standards of OAC Chapters 3745-54 and 3745-55.

(c) "Siting Criteria Document" as specified in paragraph (A) of OAC Rule 3745-50-38.

After the information supplied by the Permittee is deemed adequate by Ohio EPA, Ohio EPA will notify the Permittee that a permit modification may be submitted to incorporate the identified information into the permit.

If after a formal notice of deficiency by Ohio EPA and response by the Permittee, Ohio EPA does not deem the information adequate, Ohio EPA will cease its review and provide written notice to the Permittee. If it so chooses, the Permittee may submit a Class 2 permit modification which will be evaluated by Ohio EPA as a new request in which Ohio EPA will not be bound without final director's approval by any statements made during previous discussions of the information submitted under sub-sections (a), (b) and (c) of this Condition.

C.14 Closure and Post-Closure
OAC Rules 3745-55-10, 3745-55-11, 3745-55-78

(a) At closure of the container storage areas, the Permittee shall remove all hazardous waste and hazardous waste residues from the containment systems, in accordance with the procedures in the Closure Plan set forth in Section I of the Part B permit application.

(b) If the Permittee demonstrates that all contaminated soils cannot be practically removed or decontaminated in accordance with the Closure Plan in Section I of the Part B permit application, the Permittee shall close the unit and perform post-closure care following a plan approved by the Director of Ohio EPA.

Division of Hazardous Waste Management

Response to Comments

Project: **Ross Incineration Services, Inc.**
Draft Hazardous Waste Permit Modification
Ohio EPA ID #: OHD 048 415 665

Agency Contact for this Project

Division Contact: Ed Lim, Division of Hazardous Waste Management
(614) 644-2824, email address: ed.lim@epa.state.oh.us

Ross Incineration Services, Inc. (RIS) and Ross Transportation Services, Inc. (RTS) operate on contiguous land owned by their parent company, Ross Consolidated Corp. (RCC). RIS operates a permitted commercial hazardous waste facility. The facility includes units that store hazardous waste in containers and tanks, and treat wastes in tanks, in a filter press and in an incinerator. RTS operates as a transporter of waste whose business includes the transportation of hazardous waste from RIS's customers to a transfer facility which is located on the RCC property. As can be seen in the aerial provided as an attachment, RIS and RTS share a facility entrance and operate within the fence line of the RCC property.

In accordance with OAC rule 3745-50-51(J), the director may initiate a permit modification by issuing a draft modified permit. Ohio EPA initiated a public comment period on March 5, 2009, regarding a draft hazardous waste permit modification for RIS. The agency-initiated permit modification would incorporate RTS (as a co-operator) and its transfer activities into RIS's permit as a hazardous waste container storage unit. This document summarizes the comments and questions received during the comment period, which ended on April 20, 2009.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health. Often, public concerns fall outside the scope of that authority. Ohio EPA may respond to those concerns in this document by identifying another government agency with more direct authority over the issue.

In an effort to help you review this document, the comments are grouped by topic and organized in a consistent format.

Comment 1: **Several commenters state they are unaware of rules or laws prohibiting transfer facilities from operating on property that is contiguous with a permitted hazardous waste facility. They are concerned that Ohio EPA is initiating this modification based on guidance or policy. Another concern is that Ohio EPA is "circumventing the administrative rule-making process" through this permit modification. Two commenters request that Ohio EPA "promulgate regulations using the State's formal rulemaking process."**

Response 1: At issue is the appropriate regulatory standard applicable to transfer facility activities managing hazardous waste manifested to a designated facility where the transfer facility itself is located on property contiguous to that designated facility. The designated facility is the hazardous waste facility that has been designated on the manifest (by the generator pursuant to Ohio Administrative Code (OAC) rule 3745-52-20) as the facility which is permitted to handle the waste described on the manifest.

A transfer facility is defined by OAC rule 3745-50-10 to be "any transportation-related facility including loading docks, parking areas, storage areas and other similar areas *where shipments of hazardous waste are held during the normal course of transportation*." (Emphasis added) In general, transfer facilities are exempt from permitting requirements for the storage of hazardous waste under OAC rule 3745-53-12. When allowing for this exemption, U.S. EPA recognized the reality of the transportation of hazardous waste and that it warranted relief from some management standards for the temporary storage of hazardous waste during the normal course of transportation. The term "transportation" is defined to mean "the movement of hazardous waste by air, rail, highway, or water" (OAC rule 3745-50-10).

In order to meet the eligibility requirements for the exemption from the permitting requirements, a "transfer facility" needs to meet and comply with the standards in OAC Chapter 3745-53. The applicability requirement (OAC rule 3745-53-10(B)) states that this chapter (and therefore the permit exemption for transfer facilities) does not apply to the on-site transportation of hazardous waste at

permitted hazardous waste facilities (on-site is defined in OAC rule 3745-50-10 to mean "…the same or geographically contiguous property …"

The Ohio EPA's position is that if the "transfer facilities" are on contiguous pieces of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation to which OAC Chapter 3745-53 does not apply. Therefore, a transfer facility cannot be located on the same contiguous piece of property (i.e., on-site) as a designated facility.

All permitted hazardous waste facilities have been informed of our regulatory interpretation that if a transfer facility is being operated either at its facility or on a piece of property contiguous to their facility, the permitted hazardous waste facility cannot be the designated facility. The transfer facility may continue to operate under the regulatory exemption for hazardous waste which has been designated to other permitted facilities.

Since the rules which form the basis for Ohio EPA's position already exist, it is not Ohio EPA's intention to pursue new rules.

Comment 2: **Several commenters state that as a transfer facility, RTS is subject to regulation by the Department of Transportation, not Ohio EPA.**

As discussed in Response 1, RTS is not considered a transfer facility for the management of hazardous waste destined for RIS. Also see Ohio EPA's Response to RTS/RIS Comment 1 (below) concerning United States Department of Transportation regulations.

Comment 3: **Several commenters state that the conditions provided to Ohio EPA under OAC rule 3745-50-51(A) to initiate a permit modification do not apply to this situation.**

Response 3: Ohio Revised Code (ORC) 3734.05(I)(2) provides the authority for the director to modify an existing permit. The conditions for modifying a permit under ORC 3734.05(I)(2) are identical to the conditions listed in OAC rule 3745-50-51(A). One of these

conditions is "new information or data justify permit conditions in addition to or different from those in the existing permit."

Ohio EPA began a dialogue with RIS in late 2004 to seek an amicable resolution of the transfer facility issue. Although Ohio EPA offered several regulatory options and compliance time frames for addressing the issue, RIS did not agree to any proposal short of their current arrangement. This decision on RIS's part constitutes new information that justifies new permit conditions in addition to or different from those in the existing permit as articulated in the director's draft permit modification.

Comment 4: **Several commenters question Ohio EPA's authority to incorporate RTS and its transfer activities into RIS's permit. They state that RIS and RTS are distinct business operations, and Ohio EPA does not have the authority to take one business entity and place it in the permit of another business entity.**

Response 4: Ohio EPA does not dispute that RTS and RIS are distinct business operations and wholly-owned subsidiaries of the same parent company, RCC. However, there is no provision in state law that prevents separate business entities from being co-permittees on a hazardous waste permit. Further, RCC is already a noted permittee on the RIS permit[1] for the 36790 Giles Road location (which is the street address for both RTS and RIS). In sum, as RCC is the owner of the land at 36790 Giles Road and is and always has been a permittee, the director's draft modification is quite consistent with the operational structure at the facility.

Comment 5: **Several commenters are concerned that Ohio EPA's agency-initiated permit modification would require RTS to relocate, reducing protection to human health and the environment. They state that RTS has operated successfully and responsibly at its current site for close to 30 years with security, emergency response, and health services readily available.**

[1] http://www.epa.ohio.gov/portals/32/permits/RossPermit.pdf

Many commenters state the draft permit modification offers no tangible environmental benefit to the state. And two commenters believe the permit modification is strictly an administrative exercise and is not based on protecting human health and the environment.

Response 5: Ohio EPA's agency-initiated permit modification does not require RIS to relocate the RTS facility. Additionally, the permit modification does not ban RTS from operating a 10-day transfer facility on land contiguous to the RIS facility when the waste is destined for an off site facility. The permit modification requires RTS to manage hazardous waste destined for RIS in accordance with hazardous waste permitting requirements. (See Response 1 for the regulatory justification.) The implementation of permitting requirements; such as, inspections, training, contingency plans, secondary containment, run on/off control, and closure would increase protection to human health and the environment at the RTS facility.

Ohio EPA has not done an extensive evaluation of RTS's historic waste management activities because it is not a basis for the director's draft permit modification. However, our records show that RTS filed an annual hazardous waste report for generation of waste at the "transfer facility" for the calendar year 2006. RTS's report indicates that 15.3 tons of hazardous waste contaminated soil from a spill cleanup was generated at that location in 2006. The director's proposed action seeks construction of secondary containment that would contain spills and prevent release of hazardous waste to the environment.

Comment 6: **Many commenters state the permit modification would result in increased costs to RIS and RTS and will harm their business and sales. One commenter states this action would impact the competitive advantage that Ross Environmental Services, Inc. has developed.**

Response 6: Ohio EPA has consistently enforced our position (see Response 1) throughout the state; no other facility in Ohio operates a transfer facility sending waste to a permitted hazardous waste facility on contiguous property. When RTS circumvents permitting requirements by accepting waste destined for RIS, these companies are at an economic advantage over other permitted

facilities in Ohio that are compliant with the rules. This permit modification would put RIS and RTS on the same playing field as the other permitted facilities in Ohio.

Comment 7: **One commenter states that outside of Ohio, transfer facilities are operating without a permit, delivering waste to the contiguous treatment, storage or disposal facility.**

Response 7: Response 1 provides the regulatory justification for Ohio EPA's position. It is possible that other states have alternative rules. U.S. EPA authorized Ohio EPA to carry out its hazardous waste program in 1989. Ohio EPA implements the program in accordance with Ohio's hazardous waste laws and rules that were developed under the authority of Subtitle C of the Resource Conservation and Recovery Act.

Allowing a 10-day transfer facility to operate on contiguous property with a permitted facility would significantly undermine Ohio EPA's hazardous waste permitting authority. For example, a facility denied a permit storage increase by director's action could simply circumvent the denial by creating a transfer facility. This is clearly not U.S. EPA's intent when creating the transfer facility requirements for waste in the "normal course of transportation" and as noted above, is inconsistent with Ohio law.

Comment 8: **Several commenters state that Ohio EPA's position is diametrically opposed to Governor Strickland's Executive Order 2008-04S on the Common Sense Business Regulation process. They state it places undue hardship on businesses integral to industry and the regional economy. One commenter states this action can do irreparable harm to Ohio's standing as a preferred state and region for business.**

Response 8: Executive Order 2008 – 04S[2] requires agencies to review existing rules and processes and to specifically:

"…treat those affected by their rules and regulatory processes as customers and treat them *consistently across regions*, offices, and departments; and to consolidate regulatory rules and processes." (Emphasis added)

As noted in Response 6, the current operations whereby RTS operates a "transfer facility" on the RCC (permittee's) property constitutes a substantial benefit that is unavailable at any other Ohio facility. Consistent with the Governor's executive order, it would be inappropriate for the director to allow this significant inequity to continue.

Comment 9: Several commenters are concerned that this action would set an unwarranted precedent against the regulated community.

Response 9: As discussed in the previous eight responses, Ohio EPA believes this action is necessary to continue to consistently enforce Ohio's rules and regulations, created to ensure protection of human health and the environment.

Comment 10: One commenter provided the following comment: "The volume of hazardous waste in this new RIS storage unit would be counted against RIS' existing storage capacity, constituting no increase in the permitted allowance."

Response 10: Before RTS can operate the transfer facility area as a hazardous waste storage unit, Permit Condition C.13 of RIS's draft modified permit requires RIS to submit a permit modification application to incorporate the new hazardous waste storage unit into RIS's permit. Depending on RIS's operational flexibility, the permit modification could propose an increase to RIS's existing storage capacity. Regardless of the impact to the facility's storage capacity, RIS's permit modification is necessary to demonstrate how the RTS facility complies with permitting requirements such as: inspections, training, contingency plans, secondary containment, run on/off control, and closure.

[2] http://governor.ohio.gov/Default.aspx?tabid=586

Comment 11: **One commenter stated that "Ohio EPA appears to have misconstrued the RCRA definition of a "transfer facility" and related guidance by the U.S. EPA" as neither justifies Ohio EPA's actions; in support, the commenter discusses U.S. EPA guidance and U.S. DOT regulations on movement of wastes. The commenter states that under U.S. DOT rules, "hazardous wastes stored at the RTS transfer facility are still in the course of 'transportation' to the RIS facility…"**

Response 11: As discussed in Ohio EPA's Response to RTS/RIS Comment 1 (below), U.S. EPA authored the rule on "transfer facility" at the beginning of the national hazardous waste program. The regulatory context of "transfer facility" and the associated terms used to define it are articulated by U.S. EPA in a December 1980 preamble as a part of the Agency's rulemaking (as an Interim Final Amendment) clarifying when a transporter handling shipments of hazardous waste is required to obtain a hazardous waste storage facility permit. (45 FR 86966 December 30, 1980)

Ohio EPA's construction of the RCRA definition of transfer facility, based upon the language of the Ohio rule, is consistent with U.S. EPA's December 1980 preamble and the federal guidance cited by the commenter.

Also, for the reasons specified in Response 1 (above) and Response to RTS/RIS Comments 1 and 2 (below), RTS is ineligible for the transfer facility exclusion for hazardous waste manifested to RIS as the designated facility because the normal course of transportation has ended and storage begins.

"Storage" is defined in the ORC Section 3734.01(M) in part as "…the holding of hazardous waste for a temporary period". In this instance RIS is listed on the shipping paper or manifest as the designated facility and when the hazardous waste reaches the facility, the normal course of transportation has ended and any period of time the waste is at the designated facility is considered to be storage; the temporary holding of hazardous waste for any purpose such as unloading (e.g., trailer parking) or examinations (e.g., fingerprint analysis) is storage, a regulated activity; the hazardous waste permit regulates the waste acceptance process as either storage or staging.

Comments from RTS and RIS[3]

RTS/RIS Comment 1: Definition of "Normal Course of Transportation"

In the Public Notice and the Fact Sheet that was issued with the Director-initiated permit modification request, the Agency states:

"Hazardous waste transporters are regulated under OAC Chapter 3475-53 (Transporter Standards). Under the rules of this chapter, a transporter is not required to obtain a hazardous waste permit. However, these standards are no longer applicable once the waste is no longer in the "normal course of transportation." Waste destined for RIS ceases transportation when it arrives at RTS since both entities are located on contiguous property. Therefore, RTS and its hazardous waste management activities are subject to the hazardous waste permitting requirements." (Emphasis added).

"Transfer facility" means any transportation-related facility including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste are held during the normal course of transportation.

A transporter who stores manifested shipments of hazardous waste in containers meeting the requirements of rule 3745-52-30 of the Administrative Code at a transfer facility for a period of ten days or less is not subject to regulation under rules 3745-50-40 to 3745-50-235 and Chapters 3745-54 to 3745-57, 3745-65 to 3745-69, 3745-205, 3745-256, and 3745-270 of the Administrative Code, with respect to the storage of those wastes.

RTS' Transfer Facility is a "transportation-related facility", which includes "parking areas, storage areas and other similar areas where shipments of hazardous waste are held during the normal course of transportation". A key to this definition lies in the phrase "during the normal course of transportation", meaning that the waste has not been received by a TSDF.

[3] The following comments were submitted by RTS. Except where noted, RIS submitted identical comments. RTS and RIS comments that contain significant differences are provided in the following two sections of this Responsiveness Summary.

Each manifest for such wastes clearly identifies RTS as the transporter, but not as the final destination TSDF.

The hazardous materials regulations under 49 CFR 171.8 provide no less than three definitions pertaining to activities "incidental to movement", all of which apply to operations conducted by RTS at its 10-day Transfer Facility:

- **"Loading incidental to movement": This includes, but is not limited to, loading by carrier personnel or in the presence of carrier personnel packaged or containerized hazardous material onto a transport vehicle. Such loading activities are considered by USDOT to be incidental to movement (i.e., incidental to transportation).**

- **"Storage incidental to movement." This includes, but is not limited to, storage of a transport vehicle containing a hazardous material between the time that a carrier takes physical possession of the material for purposes of transportation until it is physically delivered to the destination indicated on the shipping document. Such storage only occurs for periods of ten days or less. In this case, the transporter has taken possession of the hazardous material from the shipper for purposes of transportation, but has not yet relinquished such material to the final destination facility, as is indicated on the shipping papers (e.g., manifest).**

- **"Unloading incidental to movement" This includes, but is not limited to, removing a packaged or containerized hazardous material from a transport vehicle after the hazardous material has been delivered to the consignee and prior to the delivering carrier's departure from the consignee's facility or premises or, in the case of a private motor carrier, while the driver of the motor vehicle from which the hazardous material is being unloaded immediately after movement is completed is present during the unloading operation. Such unloading activities are considered by USDOT to be incidental to movement (i.e., incidental to transportation).**

In particular, the regulatory definition in the USDOT regulations specific to "storage incidental to movement" is pertinent. RTS operates "transport vehicles" (i.e., trucks, vans, semi-trailers for the transportation of cargo), and conducts "transportation" activities as defined under 49 CFR 171.8. More specifically, the primary business provided by RTS is the movement of hazardous materials (including hazardous waste) and loading, unloading, or storage incidental to that movement. Transportation begins when the carrier (i.e., RTS) takes physical possession of a hazardous material (waste) for the purpose of transporting it, and continues until the hazardous material is delivered to its destination as indicated on the shipping paper. All loading, unloading, and storage functions performed by the carrier in the course of transporting a hazardous material for a commercial purpose over a public highway, by rail, air or water is subject to the requirements of the USDOT hazardous material regulations. Therefore, the term "movement" under 49 CFR 171.8 is a key part to understanding operations performed by RTS, including activities at its 10-day Transfer Facility.

The Heritage Dictionary, 3rd Edition, copyright 1992, defines "course" as the direction of continuing movement and "normal" as conforming with, adhering to or constituting a norm, standard, pattern, level or type; typical. From these definitions, we can conclude that "normal course" is subjective in nature and constitutes RTS' standard or normal practice. Furthermore, with respect to these definitional concepts, there is another which is directly relevant to this situation. It is the definition of "course of dealing." Black's Law Dictionary, Abridged Sixth Edition, West Publishing, 1991, defines "course of dealing" as follows:

A sequence of previous acts and conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

RTS' use of this space as a transfer facility constitutes RTS' standard practice or normal course of transportation.

Response to RTS/RIS Comment 1:

A transportation-related facility is also a hazardous waste transfer facility for the purpose of OAC rule 3745-50-10 (A)(120) if its waste shipments are held "during the normal course of transportation." In helping to define the term "during the normal course of transportation" as used in the Ohio hazardous waste rules, the commenter refers, in part, to several definitions from the United States Department of Transportation (U.S. DOT) regulation 49 CFR 171.8.

This federal rule and the specific definitions cited by the commenters were a part of a 2003 rulemaking promulgated by the federal Research and Special Programs Administration (RSPA), within the U.S. DOT (see 68 FR 61906, October 30, 2003) for the purpose of clarifying "the applicability of the Hazardous Materials Regulations (HMR) to specific functions and activities, including hazardous materials loading and unloading operations and storage of hazardous materials during transportation." RSPA was clear to also point out that in defining the applicability of its own rules it was not attempting to clarify the applicability of other Federal agencies' statutes or rules.

Also in this rulemaking, RSPA amended 49 CFR § 171.1 of the HMR to indicate that facilities at which functions are performed in accordance with the HMR may be subject to applicable standards and regulations of other Federal agencies or to applicable state or local government laws and regulations (except to the extent that such non-Federal requirements may be preempted under Federal hazmat law). Federal hazmat law does not preempt other Federal statutes nor does it preempt regulations issued by other Federal agencies to implement statutorily authorized programs. The purpose of the RSPA 2003 rulemaking was to clarify the applicability of the HMR to specific functions and activities. RSPA indicated that it was "not appropriate for (U.S.) DOT to attempt to clarify the applicability of other Federal agencies' statutes or regulations to particular functions or activities. However, it is important to note that facilities at which pre-transportation or transportation functions are performed must comply with OSHA and state or local regulations applicable to physical structures—for example, noise and air quality control standards, emergency

preparedness, fire codes, and local zoning requirements." (68 FR 61907, October 30, 2003)

RSPA further stated that "(f)acilities may also have to comply with applicable state and local regulations for hazardous materials handling and storage operations. Facilities at which pre transportation or transportation functions are performed may also be subject to EPA and other OSHA regulations." (68 FR 61907, October 30, 2003).

RSPA also acknowledged in the Federal Register's preamble that while the HMR provides a set of nationally uniform regulations governing functions that affect the safe transportation of hazardous materials in commerce and governing the actual transportation in commerce of hazardous materials, at the same time, the definitions adopted in the final rule permit or allow other Federal agencies, states, and local governments to exercise their legitimate regulatory roles at fixed facilities (68 FR 61915, October 30, 2003).

Thus in determining the meaning of "during the normal course of transportation" as used in the RCRA hazardous waste rules, Ohio EPA must first rely on the state's hazardous waste transfer facility rules (OAC rule 3745-50-10 and OAC Chapter 3745-53) and the U.S. EPA federal rule-making upon which it is based.

In the normal course of transportation, the purpose or function of the hazardous waste transfer facility is to consolidate and redirect shipments in order to have a more efficient and economical transportation system.

U.S. EPA authored the rule on "transfer facility" at the beginning of the national hazardous waste program. The regulatory context of "transfer facility" and the associated terms used to define it are articulated by U.S. EPA in a December 1980 preamble as a part of the Agency's rulemaking (as an Interim Final Amendment) clarifying when a transporter handling shipments of hazardous waste is required to obtain a hazardous waste storage facility permit.

Prior to the December rulemaking, U.S. EPA, in May of 1980, had promulgated regulations (45 FR 33154, May 19, 1980) establishing standards and permitting requirements applicable to owners and

operators of hazardous waste management facilities. These regulations prescribe general operating practices for all hazardous waste management facilities as well as set specific requirements for storage of hazardous waste (e.g., preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, waste analysis, security at facilities, inspection requirements, and personnel training). However, in the development of these rules, U.S. EPA was asked by the transportation industry whether U.S. EPA intended to require transporters to file permit applications and comply with the substantive standards of storage.

U.S. EPA acknowledged that a literal application of the regulations might require all transporters to obtain a RCRA permit for storage of hazardous waste. U.S. EPA recognized that many transporters operated transfer facilities (also known as “break bulk” facilities) where shipments are consolidated into larger units, or shipments may be transferred to other vehicles for re-directing or re-routing. The term “transfer facility,” as used in the December 1980 rulemaking, refers to transportation terminals (including vehicle parking areas, loading docks and other similar areas) break-bulk facilities or any other facility commonly used by transporters to temporarily hold shipments of hazardous waste during transportation (see 45 FR 86966). U.S. EPA’s premise for this regulation was that transfer facilities “are intended to facilitate transportation activities, rather than storage”, thus, they reasoned, any of the in-transit holding times are as short as practicable thus justifying a brief exemption from permitting. As a result, U.S. EPA promulgated the transfer facility rule on December 30, 1980 (45 FR 86966) allowing transporters who hold hazardous waste for short periods of time while in the course of transportation to be exempted from the permitting requirements. This rule accommodates normal and routine in-transit transfer activities of transporters which tend to facilitate movement of hazardous waste to the ultimate treatment, storage or disposal facility specified on the waste manifest rather than storage. Ohio EPA adopted this definition effective August 26, 1981.

Siting and operating a transfer operation on property contiguous to a RCRA permitted storage facility facilitates storage (i.e., increased storage capacity) rather than facilitates transportation activities

when the permitted facility is also the designated facility on the transporter's waste manifest. In this context, the RTS operation is not a transfer facility under OAC rule 3745-50-10.

OAC rule 3745-50-10 defines a transfer facility as:
"…Any transportation-related facility including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste are held during *the normal course of transportation*." (Emphasis added)

Thus, if a transfer operation is located on a contiguous piece of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation, an activity to which OAC Chapter 3745-53 does not apply. Ohio EPA has consistently enforced this position throughout the state – no other permitted facility in Ohio operates a transfer facility on contiguous property in this manner.

Absent a regulatory exclusion (ORC Section 3734.02(E)) a permit is required for the treatment, storage, or disposal of hazardous waste. ORC Section 3734.02(E) sets forth that "no person shall establish or operate a hazardous waste facility… for the storage, treatment, or disposal of any hazardous waste, without a hazardous waste facility installation and operation permit…" Except that "the prohibition against establishing or operating a hazardous waste facility without a hazardous waste facility installation and operation permit does not apply to ...a facility … that is not subject to permit requirements, under rules adopted by the director." (ORC Section 3734.02(E)(3))

Division (F) of ORC Section 3734.02 requires that: "(F) No person shall store, treat, or dispose of hazardous waste…except at or to any of the following: (1) A hazardous waste facility operating under a permit issued in accordance with this chapter; (5) A hazardous waste facility as described in division (E)(3)(b) of this section."

The mandate of ORC Section 3734 is clear. A person must comply with ORC Section 3734.02(E) and (F) before conducting treatment, storage or disposal activities at a facility.

In terms of environmental benefit, the law requires incorporating the transfer facility into RIS's hazardous waste permit as a storage area and would require upgrading the transfer facility to meet applicable permit requirements by adding secondary containment and closure requirements as well as require adding RTS on the permit as a co-operator.

Allowing a 10-day transfer facility to operate on contiguous property with a permitted facility as advocated by the commenter would significantly undermine Ohio EPA's hazardous waste permitting authority. For example, a facility denied a permit for an increase in storage capacity by director's action could simply circumvent the denial by creating a transfer facility instead. This is clearly not U.S. EPA's intent when creating the transfer facility requirements for waste in the "normal course of transportation" and as noted above, is inconsistent with Ohio law.

RTS/RIS Comment 2: Legitimate Use of Transfer Facility

Ohio EPA is contending that RTS cannot operate a transfer facility on property that is contiguous to RIS, and that any shipments in the RTS Transfer Facility that are ultimately destined for RIS have in effect reached their final destination (i.e., RIS) when they enter the Transfer Facility.

The Fact Sheet accompanying the draft permit modification issued by the Ohio EPA states, in part:

'Hazardous waste transporters are regulated under OAC Chapter 3475-53 (Transporter Standards). Under the rules of this chapter, a transporter is not required to obtain a hazardous waste permit. However, these standards are no longer applicable once the waste is no longer in the "normal course of transportation." <u>Waste destined for RIS ceases transportation when it arrives at RTS since both entities are located on contiguous property.</u> Therefore, RTS and its hazardous waste management activities are subject to the hazardous waste permitting requirements.' (emphasis added)

While it is true that RTS is located on property that is contiguous to RIS, the boundaries, structures, other appurtenances, improvements and legal liabilities for each site

are distinct. The areas utilized by the respective companies are delineated on multiple Facility Site Plans in RIS' Ohio Hazardous Waste Facility RCRA Part B Permit Application and on the respective leases each company has executed with the property owner. These Facility Site Plans denote "RTS Occupied Areas / Waste Transfer Station" and identifies its boundaries (i.e., perimeter).

A fundamental component of the supply chain management process is the effective implementation of delivery to the destination facility. For RTS to be effective in the marketplace, RTS needs to efficiently use its equipment and drivers. To that end, RTS transports waste in a manner that is consistent with the availability of the drivers and equipment, irrespective of the ability of RIS to receive that waste. Therefore, *incidental to transportation*[4], RTS uses the Transfer Facility to hold waste until it can get a delivery slot for each load to RIS. Such commodities, hazardous wastes, and non-hazardous wastes placed in RTS' 10-day Transfer Facility are therefore considered to be in the "normal course of transportation." They have not yet been received by/ delivered to their final destination or receiving facility.

A transfer facility is an integral part of the process that is utilized at the end of the delivery process. There are other portions of the process such as pick-up and/or actual hauling, however a transfer facility contemplates by its very definition its utilization after delivery has been completed. This is clear from the word "transfer" itself. The Heritage Dictionary, 3rd Edition, copyright 1992 defines "transfer" as follows:

"transfer 1. to convey or cause to pass from one place, person or thing to another. 2. to make over the possession or legal title of; convey."

The function, then of a transfer facility is to pass or convey title to hazardous waste from one person to another. This would appear to be a transfer facility's primary purpose.

[4] The italicized language was not included in RIS's comments.

Furthermore, Webster's New World Dictionary, 3rd College Edition, copyright 1991 provides the legal definition of "delivery" as

"delivery a) the irrevocable transfer of a deed or other instrument of conveyance; b) the transfer of goods or interest in goods from one person to another."

All hazardous waste delivered to RIS from the RTS Transfer Facility is done so via the hazardous waste manifest system. When RTS places a shipment of hazardous waste in its 10-day Transfer Facility, RIS does NOT accept title to such waste (i.e., it does NOT sign the manifest as the receiving facility). Rather, RTS maintains control of the shipment, signing the manifest as the Transporter, until it has coordinated a scheduled delivery to RIS. RIS subsequently signs as the receiving TSDF upon conveyance/delivery of the material into RIS receiving. To that end, RTS' use of the Transfer Facility to convey title to the waste, is legitimate, regardless of its proximity to the destination facility.

Response to RTS/RIS Comment 2:

See Response to RTS/RIS Comment 1 (above).

At issue is the appropriate regulatory standard applicable to transfer facility activities managing hazardous waste manifested to a designated facility where the transfer facility itself is located on property contiguous to that designated facility. The designated facility is the hazardous waste facility that has been designated on the manifest (by the generator pursuant to OAC rule 3745-52-20) as the facility which is permitted to handle the waste described on the manifest.

A transfer facility is defined by OAC rule 3745-50-10 to be "any transportation-related facility including loading docks, parking areas, storage areas and other similar areas *where shipments of hazardous waste are held during the normal course of transportation*." (Emphasis added) In general, transfer facilities are exempt from permitting requirements for the storage of hazardous waste under OAC rule 3745-53-12. When allowing for this

exemption, U.S. EPA recognized the reality of the transportation of hazardous waste and that it warranted relief from some management standards for the temporary storage of hazardous waste during the normal course of transportation.

In order to meet the eligibility requirements for the exemption from the permitting requirements, a "transfer facility" needs to meet and comply with the standards in OAC Chapter 3745-53. The applicability requirement (OAC rule 3745-53-10(B)) states that this chapter (and therefore the permit exemption for transfer facilities) does not apply to the on-site transportation of hazardous waste at permitted hazardous waste facilities (on-site is defined in OAC rule 3745-50-10). The Ohio EPA's position is that if these "transfer facilities" are on contiguous pieces of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation to which OAC Chapter 3745-53 does not apply. Therefore, a transfer facility cannot be located on the same contiguous piece of property, i.e., on-site, as a designated facility (the designated facility is the hazardous waste facility that has been designated on the manifest by the generator pursuant to OAC rule 3745-52-20).

"Storage" is defined in the ORC Section 3734.01(M) in part as "…the holding of hazardous waste for a temporary period". Thus if a facility is listed on the shipping paper or manifest as the designated facility and the hazardous waste reaches that facility, the normal course of transportation has ended; any period of time the waste is at the designated facility is considered to be storage; the temporarily holding of hazardous waste for brief examinations (e.g., fingerprint analysis) is storage.

Allowing a 10-day transfer facility to operate on contiguous property with a permitted facility as advocated by the commenter would significantly undermine Ohio EPA's hazardous waste permitting authority. For example, a facility denied a permit storage increase by director's action could simply circumvent the denial by creating a transfer facility instead. This is clearly not U.S. EPA's intent when creating the transfer facility requirements for waste in the "normal course of transportation" and as noted above, is inconsistent with Ohio law.

All permitted hazardous waste facilities have been informed of our regulatory interpretation that if a transfer facility is being operated either at its permitted facility or on a piece of property contiguous to their facility, the permitted hazardous waste facility cannot be the designated facility. However, the transfer facility may continue to operate under the regulatory exemption for wastes which are designated to other permitted facilities.

RTS/RIS Comment 3: Adding RTS as co-operator

The Hazardous Waste Permit Modification Fact Sheet that accompanied the Draft permit action states, in part:

"Description of Facility OAC Rule 3745-50-22(B)(1)
Ross Incineration Services (RIS) operates a commercial incineration system that treats hazardous waste received from off-site. The facility includes units that store hazardous waste in containers and tanks, and treat wastes in tanks, in a filter press and in an incinerator."

The definition of "Facility" as those terms are defined under OAC 3745-50-10 (39) and 40 CFR 260.10 are as follows.

"Facility" or "hazardous waste facility" means:

(a) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(b) For the purpose of implementing corrective action under rule 3745-55-011 of the Administrative Code, all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA. This definition also applies to facilities implementing corrective action under RCRA Section 3008(h) or section 3734.20 of the Revised Code.

A key to the definition of "Facility" as provided in the above referenced regulations is "all contiguous property under the control of the owner or operator seeking a permit…"

As previously indicated, RIS leases a specified portion of the land at 36790 Giles Road. The incinerator and all other treatment units, storage units, and associated equipment used in the incineration operations is owned and operated by RIS. Similarly, RTS leases a specified portion of the land at 36790 Giles Road. All equipment used in the transportation operations is owned and operated by RTS.

Each section of property is leased and operated by the respective companies. Neither of these parties maintain any control over the property of the other. A review of corporate documents would support the separation of assets between these two companies.

Response to RTS/RIS Comment 3:

RIS, located in Grafton, Ohio, is a permitted commercial hazardous waste treatment and storage company whose primary activity is treatment of hazardous waste by incineration. RIS is a wholly owned subsidiary of RCC, an Ohio holding corporation. RTS, also a wholly owned subsidiary of RCC, transfers hazardous waste from customers to a transfer facility which is located on the same contiguous property as RIS. The transfer facility is owned and operated by RTS. Based upon our interpretation of the transfer facility regulations, RTS's "transfer facility" is not afforded the exemption from permitting requirements since it receives and stores hazardous waste that is destined for RIS. In order for the transfer facility to operate under the exemption found in OAC rule 3745-53-12, hazardous waste received at the transfer facility cannot have RIS as its designated facility.

Owner is defined in OAC rules 3745-50-10 and 3745-50-52 and speaks in terms of ownership of a facility. The term "facility" is defined in OAC rule 3745-50-10 to mean "all contiguous land, and structures, other appurtenances, and improvements on the land, used for …storing…hazardous waste." Thus the owner is the person who holds title to the real property, structures and fixtures.

RCC holds title to real property including the parcel upon which the transfer facility is situated, and RIS owns appurtenances or fixtures used for storage and treatment of hazardous waste thus both are owners of this facility. The Ohio EPA has no information that RTS owns fixtures or appurtenances used for storage of hazardous waste. The Ohio EPA's position is that there is one facility, with at least two owners.

The term "operator" is defined in OAC rules 3745-50-10 and 3745-50-52 as the person responsible for the overall operation of the facility. To the extent RTS manages waste manifested to RIS at its transfer operation and is responsible for its day-to-day operation, RTS is conducting storage and is an operator of a portion of the facility. RIS is also an operator and responsible for day-to-day operations of its portion of the facility. Thus there are also two operators of this single facility.

Ohio EPA does not dispute that RTS and RIS are distinct business operations and wholly-owned subsidiaries of the same parent company, RCC. However, there is no provision in state law that prevents separate business entities from being co-permittees on a hazardous waste permit. RCC is already identified (along with RIS) on the current RIS hazardous waste permit as an owner for the 36790 Giles Road location.

RTS/RIS Comment 4: Adding RTS as co-operator

The Hazardous Waste Permit Modification Fact Sheet that accompanied the Draft permit action states, in part:

'The agency-initiated modification would incorporate RTS (as a co-operator) and its transfer activities into RIS' permit as a hazardous waste container storage unit.'

The proposed Agency-initiated permit action to add RTS as a co-operator of the facility ignores and undermines the core corporate separateness structure afforded to both companies by law, and negates the actions taken by both companies and the parent company to maintain corporate separateness. This equates to hundreds of thousands of dollars spent defining,

establishing and maintaining the separation of liabilities for almost 30 years.

To add RTS as a co-operator to RIS' permit does two things: 1) it forces RTS to unwillingly take on legal liabilities involved with the storage, treatment and disposal of hazardous waste, and 2) it provides jurisdiction to the Ohio EPA to further regulate RTS activities beyond its activities relative to the transfer facility.

Response to RTS/RIS Comment 4:

As indicated in Response 1 and Response to RTS/RIS Comments 1 and 2 (above), RTS is ineligible for the transfer facility exclusion for hazardous waste manifested to RIS as the designated facility because the normal course of transportation has ended and storage begins.

"Storage" is defined in the ORC Section 3734.01(M) in part as "…the holding of hazardous waste for a temporary period". In this instance RIS is listed on the shipping paper or manifest as the designated facility and when the hazardous waste reaches the facility, the normal course of transportation has ended and any period of time the waste is at the designated facility is considered to be storage; the temporary holding of hazardous waste for the purpose of unloading (e.g., trailer parking) or examinations (e.g., fingerprint analysis) is storage, a regulated activity; the hazardous waste permit regulates the waste acceptance process as either storage or staging.

Ohio EPA is not furthering its jurisdiction to regulate RTS transfer facility activities that are exempted from regulation. The transfer facility may continue to operate under the regulatory exemption for waste designated to other permitted facilities. Activities falling outside of the exemption constitute storage and are within the Ohio EPA's jurisdiction to regulate.

The owner or operator of the facility conducting storage is required to have a permit, as ORC Section 3734.02(E) sets forth that "no person shall establish or operate a hazardous waste facility… for the storage, treatment, or disposal of any hazardous waste, without

a hazardous waste facility installation and operation permit…". The mandate of ORC Section 3734 is clear; a person must comply with ORC Section 3734.02(E) and (F) before conducting treatment, storage or disposal activities at a facility.

RTS/RIS Comment 5: Ohio EPA Authority

The section in the Fact sheet entitled "Regulatory Basis to Support the Decision to Modify the Permit Application" cites OAC Rule 3745-50-22-(B)(3) – which identifies what needs to be contained in the Agency Fact Sheet, and OAC 3745-50-51(J) - which sets forth how the Director can modify a permit. What it does NOT do is provide the "regulatory basis to support the decision to modify the permit" which presumably is the purpose of this section.

In fact, nowhere in the proposed modification or its accompanying documents does the Ohio EPA cite a legitimate environmental need for this action or any applicable regulation driving this permit modification. Despite several requests to the Ohio EPA to provide its legal and regulatory justification, the Ohio EPA has referred only to various guidance documents and interpretive memos regarding the definition of "facility", "contiguous property" and "in the normal course of transportation", and not to a specific legitimate regulatory citation. Once again, RTS requests that the specific regulatory citation that 1) prohibits a transporter from operating a transfer facility on property which is contiguous to a TSDF, 2) [5] from transporting waste from its transfer facility to the contiguous TSDF via the manifest system.

According to "Getting to Know Ohio EPA", an Ohio EPA publication accessible through its website,

The Ohio Environmental Protection Agency is a state agency whose goal is to protect the environment and public health by ensuring compliance with environmental laws. Those laws and

[5] RIS's comment includes the words "prohibits a transporter."

related rules outline Ohio EPA's authority—what we can and can't do, and what things we can consider when making decisions about facility operations.

Given the absence to an appropriate regulatory citation, specific reference to how this modification to RIS' permit in the proposed manner will further environmental protection, or reference to how this action ensures compliance with environmental laws, it seems that the Agency has deviated from its published goal. *The fact is, the RTS Transfer Facility has operated safely and compliantly since 1982, when it first received its EPA ID number from the USEPA.*[6]

Simply put, there are no regulations administered by USEPA, USDOT, or their State of Ohio counterparts which prohibit a transporter from operating a transfer facility on property which is contiguous to a TSDF, or from transporting waste from its transfer facility to the contiguous TSDF via the manifest system.

Response to RTS/RIS Comment 5:

See Response 1 and Response to RTS/RIS Comments 1 and 2 (above).

RTS/RIS Comment 6: Governor Strickland's Executive Order

Finally, RTS is perplexed as to why a State agency chose to initiate such actions now, after it has received an Executive Order from Governor Strickland to implement common sense business regulations and foster an environment which facilitates and promotes business growth. Please note the following sections of the Governor's Directive in particular:

- **"Ohio is committed to fostering an environment that facilitates and promotes business growth. In order for Ohio to remain an attractive venue for entities doing or seeking to do business in the State, Ohio must ensure that its regulations create an atmosphere in which**

[6] The italicized language was not included in RIS's comment.

businesses and individuals affected by those regulations are treated as partners in identifying and achieving regulatory goals. Accessibility, flexibility, respect, timely responsiveness, problem solving, and continuous improvement must be the hallmarks of the State's approach to regulatory activity."

- **"Agency rules are expected to impose the least burden and costs to business, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective. This will make Ohio a more attractive place to do business and avoid placing entities doing business in the State at a competitive disadvantage relative to businesses located in other states or countries."**

RTS believes the Agency's action is diametrically opposed to the business and job focused goals advocated by Governor Strickland and President Obama, especially when we are in the midst of the worst economic situation since the Great Depression.

The Ohio EPA itself has publicly recognized the need to be sensitive to business needs. In his testimony to the House Finance Subcommittee for Agriculture and Development on March 12, 2009, Director Chris Korleski acknowledged a need to balance the need for environmental protection and economic development:

…there can be no question about the very significant role that Ohio EPA plays with respect to Ohio's economic development and economic prosperity, primarily through the issuance of various types of permits and approvals that businesses need to get established, and to grow and expand. Indeed, two years ago when I stood before this committee, I emphasized my belief that we must find and maintain the necessary balance between environmental protection and economic development.

RTS fails to understand how the draft permit action taken by the Ohio EPA aligns with the Director's comments regarding

the balance between the economy and environmental protection. For instance:

- **After years of negotiations and significant resources expended by both parties to reach an amicable and mutually beneficial compromise, [7] the agency ceased discussions and took a unilateral action demanding the most extreme technical standards be met and forcing RTS into a resource intensive and unpredictably risky permit process.**

- **The Agency's draft action would result in putting these two Ohio companies at a competitive disadvantage with other companies in their respective industries nationwide by requiring them to invest nearly $1MM collectively in modifications to their operations without legitimate legal or regulatory authority or clear environmental benefit.**

- **Because the Agency has pursued resolution of this issue in this manner, RTS has been forced to incur significant legal expense to protect their interests and rights against an administrative agency intent on strong arming them into unnecessary and expensive upgrades to a Transfer Facility that has operated safely and to heightened standards for the nearly 30 years.**

- **The Agency's action has diverted significant resources within these two companies away from critical operational initiatives intended to facilitate the companies' survival during the these difficult economic times as well as projects that actually do provide substantive improvements in human, health and the environment, such as corrective action.**

These issues have clearly not been taken into consideration within the context of the Ohio EPA's draft permit modification.

[7] RIS's comment included the language "without any forewarning."

Response to RTS/RIS Comment 6:

The activities carried out by RTS and the subjects of this modification are regulated by the hazardous waste rules. The Executive Order and the director's comments do not advocate ignoring the applicability of legal requirements. Executive Order 2008 – 04S requires agencies to review existing rules and processes and to specifically:

"…treat those affected by their rules and regulatory processes as customers and treat them consistently across regions, offices, and departments; and to consolidate regulatory rules and processes." (Emphasis added)

As noted before, the current operations whereby RTS operates a "transfer facility" on the RCC (permittee's) property, constitutes major benefit that is unavailable at any other Ohio facility. In RTS/RIS's own estimation (as commented), it would be considered a $1 million benefit (or purported cost estimate to upgrade the facility). Consistent with the Governor's executive order, it would be inappropriate for the director to allow this significant inequity to continue.

Finally, no right of private action is created by the Executive Order.

RTS/RIS Comment 7: Closing Comments and Conclusion

There is no rational, demonstrated technical or environmental basis for this Permit modification action, and as such, it imposes additional, unnecessary and unreasonable resource burdens on RTS (and incidentally the Ohio EPA) that provide no benefit to human health and the environment. The draft permit modification proposed by Ohio EPA, to upgrade the Transfer Facility to meet the regulatory requirements of a permitted storage unit, would require RIS to invest approximately $1 million in upgrades to an area that is legitimately exempt from such requirements by law. These additional burdens make RTS (and all Ohio businesses upon which they are imposed) less competitive opposite businesses in other states who do not have such burdens. This is particularly unfortunate at a point in time when the State is

struggling with an intense budget crisis and Ohio businesses are struggling to remain competitive in an under-performing economy.

Ohio EPA has exceeded its regulatory authority and statutory mandate in establishing these permit conditions as RCRA operating permit requirements in the State of Ohio. There are no Federal or State laws or regulations that make these conditions operating requirements. The State is imposing conditions not required by, and therefore, more stringent than the Federal RCRA program. The underlying premise of the Ohio delegated RCRA program is consistency and equivalency with the Federal RCRA program. To the extent that the State of Ohio seeks to be more stringent that the Federal program, the State must demonstrate, through evidence, that additional stringency is necessary to protect human health and the environment. The State has not done so, nor even attempted to do so.

To the extent that the State seeks to impose such requirements, or similar requirements, in a blanket manner in all RCRA permits in Ohio, the State must engage the full administrative rulemaking process, subject to public notice and comment. The State has failed to do so and, therefore, is establishing rulemaking through the permit process. This is an abuse of administrative discretion by the State Agency.

The history of the State's RCRA and other environmental programs is replete with examples of where the State's deviance from the explicit requirements of federal programs has created unnecessary burdens on Ohio business and the State's regulatory agencies. Fortunately, the Governor and the Ohio General Assembly has recognized the need for Ohio business to be more competitive and not be saddled with regulatory burdens not imposed by other states, and especially those that provide no demonstrable benefit to the public good. The Ohio General Assembly has set clear direction that corrects and controls existing and potential abuse of regulatory discretion by Ohio's regulatory agencies.

So what is the driving force behind the Agency's draft action? While not mentioned in the draft PMR or accompanying documents, the Ohio EPA has made mention on several occasions during prior negotiations and discussion on this matter, to the "competitive advantage" that RIS and RTS realize by having a 10-day Transfer Facility on contiguous property to a TSDF. According to representatives of the Ohio EPA, there are other facilities in the State of Ohio who wish to construct a transfer facility on their property, and have referenced RIS' use of "its" Transfer Facility. This apparently has been the trigger for this action, and Agency representatives have confirmed on numerous occasions that they feel this "gives Ross a competitive advantage."

First, and most puzzling, it is unclear when the Ohio EPA received authority to regulate commerce in the State of Ohio and use its omnibus authority to "level the playing field" among TSDFs throughout the state, particularly for issues that are not environmentally driven.

Additionally, the modification that the Agency has proposed will cost approximately $1 million in capital improvements plus any costs associated with the appropriation of land from RTS to RIS, lease modification requirements, logical issues associated with RTS' delivery procedures and RIS' receiving procedures, legal expenses and permitting costs to name a few. The net result of the financial impacts of implementing this permit modification will be to put the Ross companies at a competitive DISADVANTAGE, not only to other TSDFs in the State, but throughout the country. RTS is aware of several facilities throughout the nation who operate 10-day transfer facilities on contiguous property to TSDFs, or in at least one case, onsite (e.g., Clean Harbors, El Dorado, AK; Romic Environmental Technologies, Chandler, AZ). To require Ohio facilities to comply with a more stringent standard in an effort to level the playing field within the State will put Ohio businesses at a competitive disadvantage to other TSDFs in the country.

Furthermore, the Ohio EPA is absolutely correct within the intent of the law and within their regulatory authority to deny

requests from other TSDFs who wish to operate transfer facilities on contiguous property. TSDFs should NOT be allowed to operate transfer facilities. Legitimate transportation companies on the other hand, such as RTS, are afforded exemptions under the regulations to operate 10-day transfer facilities for a reason: these regulations do not prohibit the use of a transfer facility on contiguous property to a designated TSDF.

Finally, interpretations and guidance documents cited by the Agency do not constitute a regulatory requirement nor are they legally enforceable. Such documents have not undergone a formal rulemaking review process, including documentation of a clear need, peer review, and comments from interested parties. As such, Agency guidance does not carry the force of law and Ohio EPA cannot use guidance to impose its will on a regulated entity.

With this action, the Ohio EPA appears to be circumventing the administrative rule-making process. An Ohio Administrative agency is permitted to exercise only such jurisdiction and powers as are conferred upon it by the Ohio Constitution or by the statute that created it or vested it with such powers. Administrative agency powers are implemented by two primary mechanisms: rulemaking and adjudication. For rulemaking purposes, the Agency must prepare a complete and accurate rule summary and fiscal analysis of each proposed rule that it files.

Before a proposed rule can be made final, an evaluation of the certain key elements is necessary to determine if the proposed rulemaking is legal and defensible. If the Ohio EPA has determined that there is sufficient cause to mandate implementation of its interpretation of the transfer facility and TSDF facility definitions at all treatment, storage and disposal facilities throughout the state of Ohio as a condition of an operating permit, that it has a technical and legal basis for implementation of the guidance, and that its actions are consistent with and no more stringent than the Federal program, then Ohio EPA should easily be able to justify rulemaking through these administrative procedures. To that

end, should Ohio EPA believe its position on 10-day transfer facilities is correct, then RES, on behalf of RTS, requests the Agency promulgate regulations using the State's formal rulemaking process.

Response to RTS/RIS Comment 7:

See generally Response to RTS/RIS Comments 1 through 6 (above) as well as Response to RTS Comments 1, 2 and 3 (below).

There is a sound legal basis in current law and rules for Ohio EPA to regulate the management of hazardous waste designated to RIS under the manifest; and, a hazardous waste permit is the required. In terms of equivalency with the federal program, Ohio EPA is an authorized state and its definition of "transfer facility" is identical to that of U.S. EPA. Ohio EPA is trying to be consistent with and not more stringent than the federal program. The Ohio EPA's position, as well as U.S. EPA's, is that if the "transfer facilities" are on contiguous pieces of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation to which OAC Chapter 3745-53 does not apply. Therefore, a transfer facility cannot be located on the same contiguous piece of property, i.e., on-site, as a designated facility. Since sound legal authority exists, there is no abuse of administrative discretion and there is no need to seek additional rulemaking.

Comments from RTS

RTS Comment 1: Accuracy of Language as pertains to Corporate Separateness

In the Fact Sheet describing the Hazardous Waste Permit Modification that accompanied the Ohio EPA's March 4th draft Permit Modification, the Agency states, in part, that

'RTS, a sister company of RIS, transfers hazardous waste from RIS's customers to a transfer facility which is located on the same contiguous property as RIS. Of the waste received by RTS, roughly 85% of the waste has RIS designated as the destination facility,'

While it is true that RTS is a sister company of RIS, RTS does not "transfer waste from RIS's customers to a transfer facility." RTS transports waste for and from RTS' customers to the facility designated on the manifest. Sometimes RTS' customer is RES, the contracting entity that enters into transactions for the management of hazardous waste with multiple generators, brokers and other various waste handlers. Sometimes it is with these entities directly. Sometimes the designated facility is RIS, and sometimes it is another facility designated on the manifest. Not all of the waste managed by RTS in the Transfer Facility is destined for RIS. While the Agency indicates that the waste destined for RIS is roughly 85%, this percentage can greatly vary depending on the state of the market, the opportunities that RTS has won, and so on. That said, RTS fails to see the relevance of the percentage of waste in the Transfer Facility destined RIS has in regards to the Agency's draft action. If only 10% was destined for RIS, would this change the Agency's position? 25%? 50%? Is it intended to somehow demonstrate that the RTS transfer area is simply being used by RIS merely as additional, unpermitted storage? The reality is, RIS is RTS' largest customer. However, RTS does not exist for the sole purpose of serving RIS, nor does it operate as a mere extention of the RIS business. While it is no secret that the RTS and RIS share a mutually beneficial business relationship which requires significant coordination between the parties, these two companies operate as separate and distinct legal entities, driven by separate revenue generating activities, incurring separate debt and liabilities associated with their distinct businesses, and managing their independent business arrangements both within the Ross companies (e.g., RES) and with external entities such as contractors, financial institutions, and customers.

The Agency's misrepresentation of the two companies' activities and apparent indifference to the companies' multiple attempts to explain the entities corporate separateness raises additional concerns. On May 18, 2007, RES, on behalf of RIS and RTS submitted a response to the Agency's request to upgrade the RTS Transfer Facility to certain technical

standards. In this response, RES delineated the multiple reasons why it did not agree with the Agency's proposal, including arguments supporting the separateness of the operating companies, some of which are reiterated below.

Each of the RCC subsidiaries operate as separate and distinct entities. For instance, each has:

- **its own Officers and Directors,**
- **separate executive management and staff,**
- **independent financial transactions (bank accounts, debtors and creditors, assets, tax filings, accounting records and financial statements, Federal Tax ID numbers, etc.),**
- **unique federal EPA Identification numbers (applicable only to RIS and RTS)**
- **different Standard Industrial Classification ("SIC") codes established by the US Census Bureau to identify processes, products and services**
- **different North American Industrial Classification System ("NAICS") codes which were established with the passage of the North American Free Trade Agreement ("NAFTA") to replace the SIC code system for many reporting purposes; and**
- **separate regulatory compliance requirements and regulating agencies.**

While it may appear to the Agency that the companies' corporate structure exists merely for legal liability purposes, the three operating companies conduct business with each other in the same manner as they do with their other respective vendors and customers. RES, the primary contracting authority, has relationships with customers in a variety of industries, and maintains a significant vendor network to provide those customers full service in a variety of treatment, disposal, and recycling options. RIS and RTS are two such vendors. Service contracts exist between all three entities, and conventional transactions (e.g., quotes, Waste Management Agreements, contract orders, invoicing, etc.) occur as a normal course of business. RTS provides the same level of service, obligations, schedules, expectations,

equipment, and hours of service to RES and RIS as it does any other customer or final destination facility to which or for which it ships waste or commodities. While RES provides logistical services to RTS under contract, RIS does not participate in any operational decisions made at RTS with regards to transportation logistics, scheduling, commodities or waste held in the Transfer Facility, or the final destination facility. These decisions are made by the shipper of the commodities or waste with RTS. Likewise, RTS does not participate in any operational decisions made at RIS with regard to waste profiling, acceptance, storage and treatment. These decisions are made by RIS in compliance with its permits and applicable Federal and State of Ohio regulations.

RTS operates in compliance with the Federal and State of Ohio regulatory requirements for a transporter of hazardous waste under OAC 3745-53 and 40 CFR 263. *RTS does not operate as a hazardous waste treatment, storage or disposal facility ("TSDF").* It does not treat, store or dispose of hazardous waste as those terms are defined under Federal and State regulations for purposes of RCRA permitting and compliance. Likewise, RTS does not operate a "facility" or "hazardous waste facility" as those terms are defined under OAC 3745-50-10 (39) and 40 CFR 260.10.

Conversely, RIS is permitted and regulated under RCRA as a TSDF. RIS has been issued a RCRA Part B Permit by the United States Environmental Protection Agency ("USEPA"), and a Hazardous Waste Facility RCRA Part B Permit from Ohio EPA for its hazardous waste storage and treatment activities. *RIS does not operate as a transportation company.* RIS does not own or operate any transportation vehicles, or have contract carrier authority or authorization for the transportation of hazardous waste.

Additional differences and separations among the companies include:

Separate Permitting / Registration Status: Due to the separate nature of their businesses, RTS and RIS are subject to different permitting requirements by applicable Federal and

State agencies. Whereas RTS has Hazardous Waste Transporter permits in 34 states, RIS carries multiple environmental permits, such as its Federal RCRA Part B permit, its Ohio Hazardous Waste Facility Part B Permit (02-47-0295), its Ohio Title V Air Permit (02-47-05-0278) and a USEPA NPDES Stormwater Permit (OHR00002).

Separate Regulatory Compliance Requirements: Because it operates as a commercial transporter and carrier, RTS complies with its own distinct regulatory, training, inspection, recordkeeping and reporting requirements, separate from RIS. Further, RTS (and not RIS) is subject to motor carrier regulations administered by the Ohio Public Utilities Commission ("PUCO") through the Ohio Department of Transportation ("ODOT"). RTS must comply with regulations set forth for transporters set forth in 40 CFR 263 - *Transporters of Hazardous Waste*, 49 CFR 177 - *Carriage by Public Highway*, OAC 3745-53 - *Transporters of Hazardous Waste*, and OAC 4901:2 - *Motor Carriers*.

RIS must comply with standards set forth for hazardous waste TSDFs: 40 CFR 264 - *Standards for Owners and Operators of TSDFs*, 49 CFR 173 - *Shippers*, OAC 3745-52 - *Generators of Hazardous Waste*, OAC 3745-54 - *Standards for the Management of Hazardous Waste*, OAC 3745-55 - *Closure and Post-Closure*.

Separate SIC and NAICS Codes: Standard Industrial Classification ("SIC") codes are established by the US Census Bureau to identify processes, products and services. Typically, USEPA uses SIC codes in its various permitting and reporting data systems (e.g., Toxic Release Inventory reporting). The SIC code most applicable to RTS is 4213 – "Waste hauling, hazardous." The SIC code most applicable to RIS is 4953 – "Refuse Systems." Similarly, North American Industrial Classification System ("NAICS") codes were established with the passage of the North American Free Trade Agreement to replace the SIC code system for many reporting purposes. The NAICS code most applicable to RTS is 484220 "Waste hauling, hazardous." The NAICS code most

applicable to RIS is 562211 – "Hazardous waste treatment and disposal."

Separate EPA ID Numbers: A unique EPA Identification (ID) number is assigned by USEPA to each hazardous waste generator; hazardous waste transporter; and TSDFs; among others. EPA ID numbers are site-specific, and need only be obtained once, although the generator should update the state or Region if his or her waste activities change. Each EPA ID number consists of twelve alphanumeric characters. The first two letters are simply the two-letter abbreviation for the state in which the facility is located; whereas, the third character is either a number or letter indicating the "type" of ID number. A nine-digit number uniquely associated with the site follows these first three characters.

RTS and RIS have each been issued their own unique US EPA ID numbers:

RTS – OHD 980 614 374
RIS – OHD 048 415 665

Important to note is the Ohio EPA's recent action pertaining to RTS' EPA ID number. In January, 2009, the Ohio EPA issued notification to RIS that it intended to initiate a permit action to,

'incorporate the Ross Transportation Services, Inc. (RTS) 10-day transfer storage activities and/or operations located on property contiguous to the RIS facility into RIS's permit as a hazardous waste container storage unit, subject to the container storage requirements of OAC rules 3745-55-70 to 3745-55-78.'

In this correspondence, the Ohio EPA presented its position that the waste is no longer in the "normal course of transportation once it has arrived at the destination facility." It further stated:

'The Transportation Standards in OAC Chapter 3745-53 are inapplicable to the on-site transportation of hazardous waste at permitted hazardous waste facilities. As such, RTS and its

hazardous waste management activities are subject to the hazardous waste permitting requirements.'

RIS, by and through legal counsel, responded that the Ohio EPA lacked the appropriate regulatory authority to modify RIS' RCRA Part B Permit in this manner, and reiterated its position that RIS neither leased nor controlled the Transfer Facility which was the subject of the action.

The Ohio EPA, presumably recognizing that USEPA had acknowledged these two companies as separate and distinct entities with issuance of their respective EPA ID numbers nearly 30 years ago, only then decided to issue a notification to RTS of its intent to retract its EPA ID number, citing that issuance of a separate number to RTS on the part of the USEPA had been in error since two facilities with the same address could not have two EPA ID numbers. It further stated that:

'The Transportation Standards in OAC Chapter 3745-53 are inapplicable to the on-site transportation of hazardous waste at permitted hazardous waste facilities. Therefore, Ohio EPA will retract the [RTS] number 30 days from the date of the letter.'

Clearly the purpose of the retraction was to further the Agency's attempt to legitimize its actions and gain leverage to force RTS to relinquish its Transfer Facility. What it did, however, was demonstrate the Agency's lack of understanding as to the independent nature of RTS' business or how this would disenfranchise RTS and potentially put it out of business. RTS' EPA ID number is, very simply, its authorization to transport hazardous waste. It appears on every hazardous waste manifest that it ships as the transporter. Further, it is made part of virtually every State transportation permit that RTS holds. Without this EPA ID number, RTS would not be able to haul hazardous waste to its Grafton Transfer Facility for RIS, RES or any other customer for that matter. In fact, it would not be permitted to haul hazardous waste at all.

Furthermore, the Agency is inaccurate in its assertion that the USEPA erroneously issued RTS an EPA ID number because it was located on the same property and held the same address as RIS. There are literally hundreds of examples RIS can point to of facilities that share a location and an address that have been issued multiple EPA ID numbers. Again, the action to retract RTS' ID number was an attempt by the Ohio EPA to gain leverage and force these two companies to comply with its demands regardless of any legitimate regulatory or legal authority.

Response to RTS Comment 1:

At issue is the appropriate regulatory standard applicable to transfer facility activities managing hazardous waste manifested to a designated facility where the transfer facility itself is located on property contiguous to that designated facility. The designated facility is the hazardous waste facility that has been designated on the manifest (by the generator pursuant to OAC rule 3745-52-20) as the facility which is permitted to handle the waste described on the manifest.

A transfer facility is defined by OAC rule 3745-50-10 to be "any transportation-related facility including loading docks, parking areas, storage areas and other similar areas *where shipments of hazardous waste are held during the normal course of transportation*." (Emphasis added) In general, transfer facilities are exempt from permitting requirements for the storage of hazardous waste under OAC rule 3745-53-12. When allowing for this exemption, U.S. EPA recognized the reality of the transportation of hazardous waste and that it warranted relief from some management standards for the temporary storage of hazardous waste during the normal course of transportation. The term "transportation" is defined to mean "the movement of hazardous waste by air, rail, highway, or water" (OAC rule 3745-50-10).

In order to meet the eligibility requirements for the exemption from the permitting requirements, a "transfer facility" needs to meet and comply with the standards in OAC Chapter 3745-53. The applicability requirement (OAC rule 3745-53-10(B)) states that this chapter (and therefore the permit exemption for transfer facilities)

does not apply to the on-site transportation of hazardous waste at permitted hazardous waste facilities (on-site is defined in OAC rule 3745-50-10 to mean "…the same or geographically contiguous property …"

The Ohio EPA's position is that if the "transfer facilities" are on contiguous pieces of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation to which OAC Chapter 3745-53 does not apply. Therefore, a transfer facility cannot be located on the same contiguous piece of property (i.e., on-site) as a designated facility.

All permitted hazardous waste facilities have been informed of our regulatory interpretation that if a transfer facility is being operated either at its facility or on a piece of property contiguous to their facility, the permitted hazardous waste facility cannot be the designated facility. The transfer facility may continue to operate under the regulatory exemption for hazardous waste which has been designated to other permitted facilities.

Pursuant to the January 2009 correspondence from Ohio EPA and a conference call on or about February 26, 2009, the issue of whether RTS could continue to utilize this ID number for transportation purposes was held in abeyance pending the outcome of the resolution of the issues raised by the current permit modification.

RTS Comment 2: Adding RTS as co-operator

The Ohio EPA's draft permit adds the following conditions to Module C – Containers Storage & Management (as italicized):

'Containers of hazardous waste are stored in 1) Bulk Storage Area (BSA), 2) Oxidizer Storage Building (OSB), *3) RTS Transfer Storage Area* and 4) Container Storage Facility'

'The Transfer Storage Area is outdoors in the southeast portion of the facility. Containerized waste destined for Ross Incineration Services, Inc. historically has been stored at the Transfer Storage Area in truck tankers, roll-offs and semi-trailers.'

This action constitutes an appropriation by the Ohio EPA of the property from RTS without just compensation for its value and the residual damage this would have on RTS. Due to this illegal appropriation, RTS is prohibited from using this property as legally permitted by law for storage of waste for up to 10-days without a permit, for any waste destined for its largest customer, RIS. This would significantly impact RTS' business, and RTS would be forced to find another suitable property to serve as a transfer facility while it awaits a delivery slot at RIS. However, an appropriate property is difficult to locate. Zoning resolutions in many nearby municipalities, including Eaton Township, restrict the use of property for holding/storing hazardous materials. Ultimately, finalization of the draft permit modification would cause RTS to suffer great hardship and potentially put its business in jeopardy.

Ohio EPA has exceeded its regulatory authority and statutory mandate in establishing these permit conditions as RCRA operating permit requirements. There are no Federal or State laws or regulations that grant Ohio EPA the authority to force one company to appropriate land from another.

Response to RTS Comment 2:

The modification is not an appropriation by Ohio EPA.

Based upon our interpretation of the transfer facility regulations, RTS's "transfer facility" is not afforded the exemption from permitting requirements since it receives and stores hazardous waste that is destined for RIS. In order for the transfer facility to operate under the exemption found in OAC rule 3745-53-12, hazardous waste received at the transfer facility cannot have RIS as its designated facility. Absent the regulatory exemption, a permit is required of the owner or operator for the storage and management of hazardous waste destined for RIS. (See Response to RTS/RIS Comment 1 discussing ORC Section 3734.02(E) and (F))

ORC Section 3734.05(I)(2) provides the authority for the director to modify an existing permit. Ohio EPA began a dialogue with RTS/RIS in early 2004 to seek an amicable resolution of the

transfer facility issue. Although Ohio EPA offered several regulatory options and compliance time frames for addressing the issue, RTS/RIS would not agree to any proposal short of their current arrangement. This decision on RTS/RIS's part constitutes new information that justifies permit conditions in addition to or different from those in the existing permit as articulated in the director's draft modification.

Owner is defined in OAC rules 3745-50-10 and 3745-50-52 and speaks in terms of ownership of a facility. The term "facility" is defined in OAC rule 3745-50-10 to mean "all contiguous land, and structures, other appurtenances, and improvements on the land, used for …storing…hazardous waste." Thus the owner is the person who holds title to the real property, structures and fixtures. RCC holds title to real property including the parcel upon which the transfer facility is situated, and RIS owns appurtenances or fixtures used for storage and treatment of hazardous waste thus both are owners of this facility. The Ohio EPA has no information that RTS owns fixtures or appurtenances used for storage of hazardous waste. The Ohio EPA's position is that there is one facility, with at least two owners.

The term "operator" is defined in OAC rules 3745-50-10 and 3745-50-52 as the person responsible for the overall operation of the facility. To the extent RTS manages waste manifested to RIS at its transfer operation and is responsible for its day-to-day operation, RTS is conducting storage and is an operator of a portion of the facility. RIS is also an operator and responsible for day-to-day operations of its portion of the facility. Thus there are also two operators of this single facility.

Ohio EPA does not dispute that RTS and RIS are distinct business operations and wholly-owned subsidiaries of the same parent company, RCC. However, there is no provision in state law that prevents separate business entities from being co-permittees on a hazardous waste permit. RCC is already identified (along with RIS) on the current RIS hazardous waste permit as an owner for the 36790 Giles Road location.

RTS Comment 3: Benefits of Transfer Facility Current Location

Given that the purpose of a transfer facility is to pass or convey title to hazardous waste from one person to another, it would be beneficial in accomplishing its purpose to have a transfer facility as close as possible to its "designated facility". This is precisely why a transfer facility, contiguous to a designated facility, is not only acceptable but preferred. The question the Director must answer is what environmental benefit is served by separating a transfer facility and the designated facility by a public highway? There are no benefits that come to mind. In fact, common sense dictates just the opposite. The closer a transfer facility is to the designated facility, the safer the transfer of title and conveyance of hazardous waste will be.

That is the case with RTS and RIS. At its current location, the RTS Transfer Facility is actually more beneficial to public health, safety and the environment, and therefore preferable over a remote location where services like security, emergency response, health services, etc. are unavailable or less readily available. Due to its unique, close proximity to a RCRA Part B permitted facility (i.e., RIS), RTS has been able to meet the highest standards possible for a 10-day Transfer Facility, and operate in the most safe and environmentally protective way possible. By operating the 10-day Transfer Facility at its existing location for nearly 30 years without significant injury or incident, RTS has demonstrated that such activities can be conducted contiguous to a RCRA Part B permitted facility in a manner that is protective to public health and safety, and the environment. The same cannot always be said for transfer facilities which are operated from a remote location and/or some distance from their final destination facilities.

For instance, in the event of a hazardous materials incident while a shipment is in the Transfer Facility, RTS can rely on assistance from RIS trained personnel for immediate response. Service agreements between the two companies commit RIS' Emergency Response Team ("ERT") which is made up of some 35 specifically trained personnel, as well as

RTS employees, to help with clean up and mitigation as appropriate. RIS' ERT is trained in accordance with the Occupational Safety and Health Administration's ("OSHA's") 29 CFR 1910.120 "Hazardous Waste Operations and Emergency Response" standards. In addition, RTS has an RIS emergency coordinator available for supervising emergency response activities 24 hours per day.

Additionally, should an event occur that requires the assistance of outside authorities, the Eaton Township Fire Department is less than one mile from the two facilities, and can typically respond to a call within five to ten minutes. In addition, the Lorain County Sheriff's Department operates a post less than one mile from the two facilities and, depending on demand, can respond to a call within 15 minutes. Finally, the EMH Regional Health Care and its adjoining Emergency Center are located within a 10 to 15 minute drive from the facilities. Coordination agreements are in place with each of these local authorities to assist in the event of an emergency.

Moreover, both properties are surrounded by a six-foot high chain link, barbed wire fence. Signs with the legend "*Danger – Unauthorized Personnel Keep Out*" are posted at each entrance to the facility, and at other locations on the fence, such that they can be seen from any approach to the active portions of the site. The operating areas of both facilities are well lit for both operating and security purposes. Inventory in the 10-day Transfer Facility which is incidental to transportation is managed by RTS employees, and is tracked by a computer management system.

Since the two facilities share a gated, main entrance which is controlled by a security guard at all times (24 hours per day, 7 days per week), all employees, visitors, deliveries and shipments must have appropriate clearance from the security guard before entering or departing these facilities. All employees are required to carry at least two forms of identification and present them upon request. Visitors (e.g., outside carrier drivers) are logged into the facility by the security guard each time they enter, and are required to present employer identification for verification against

shipment or contractor schedules and/or shipping papers. Visitors are required to wear visitor identification badges while on the facility premises. With some exceptions for outside carriers who have the appropriate training, agreements and security clearance, all visitors are escorted by site personnel at all times.

Finally, as the Agency is aware, RIS has been assigned two full-time Division of Hazardous Waste Management ("DHWM") inspectors from Ohio EPA's Northeast District Office. These inspectors are often on-site at RIS (two to three times per week), and have access to the RTS 10-day Transfer Facility, which they pass as part of visits to the RIS process and storage areas. Due to the current access which Ohio EPA's DHWM has to RTS, this enables the Transfer Facility to be monitored more readily if necessary, due to its unique location. Ohio EPA's inspectors may not have such ready access if the Transfer Facility was relocated. In addition, there does not appear to be an administrative mechanism for Ohio EPA to identify those locations that operate a 10-day transfer facilities, since these locations are exempt from RCRA requirements. Due to the close proximity of RTS to RIS, its 10-day Transfer Facility is accessible, through RTS' voluntary cooperation, to much more oversight by Ohio EPA than other such transfer facilities located elsewhere in the State.

In lieu of upgrading the contiguous portion of the property occupied by the Transfer Facility, RTS contemplated relocating its Transfer Facility to a suitable noncontiguous property. However, an appropriate property is difficult to locate. Zoning resolutions in many nearby municipalities, including Eaton Township, restrict the use of property for holding/storing hazardous materials.

The community may also have concerns with RTS being required to use a 10-day hazardous waste Transfer Facility that is located some distance from a RCRA TSDF, when by operating on adjoining property, RTS, with assistance from RIS, has demonstrated through a proven history that it is currently far more equipped and ready to provide emergency assistance in the event of a spill, release, or other emergency.

Ultimately, there is no practical environmental benefit to moving a 10-day hazardous waste Transfer Facility to a non-contiguous location compared to storing it at the existing RTS Transfer Facility where emergency response capabilities and regulatory compliance assistance already exist. From an environmental impact perspective, it is more environmentally protective to have the existing transfer station at its present location where such transfer activities have occurred safely for almost 30 years, than to develop another commercial or "virgin" piece of property for hazardous waste transfer usage. The use of a remote transfer facility off-site also encourages additional unnecessary movement of hazardous waste over public highways.

Response to RTS Comment 3:

Ohio EPA's analysis begins with applicable law necessary for the protection of human health and the environment. As described in Ohio EPA's responses throughout this Responsiveness Summary, the transfer facility exclusion is inapplicable to RTS for hazardous waste designated to RIS. Instead, the law requires the management and movement of such hazardous waste be regulated under a hazardous waste permit and accompanying regulatory requirements. These regulations prescribe general operating practices for all hazardous waste management facilities as well as set specific requirements for storage of hazardous waste (e.g., preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, waste analysis, security at facilities, inspection requirements, and personnel training). The permit and regulations create enforceable legal duties the owner or operator must comply with for the protection of the public and the environment. The practices and agreements described in the RTS comment are voluntary or contractual agreements subject to change between the parties and not, for Ohio EPA, enforceable legal obligations based on applicable law for the protection of the public.

Comments from RIS

RIS Comment 1: Accuracy of Language as pertains to Corporate Separateness

In the Fact Sheet that accompanied Ohio EPA's March 4th draft Permit Modification, the Agency states, in part, that

'RTS, a sister company of RIS, transfers hazardous waste from RIS's customers to a transfer facility which is located on the same contiguous property as RIS. Of the waste received by RTS, roughly 85% of the waste has RIS designated as the destination facility.'

While it is true that RTS is a sister company of RIS, RTS does not "transfer waste from RIS's customers to a transfer facility." RTS transports waste for and from RTS' customers to the facility designated on the manifest. Sometimes RTS' customer is RES, the contracting entity that enters into transactions for the management of hazardous waste with multiple generators, brokers and other various waste handlers. Sometimes it is with these entities directly. Sometimes the designated facility is RIS, and sometimes it is another facility designated on the manifest. Not all of the waste managed by RTS in the Transfer Facility is destined for RIS. While the Agency indicates that the waste destined for RIS is roughly 85%, this percentage can greatly vary depending on the state of the market, the opportunities that RTS has won, and so on. That said, RIS fails to see the relevance of the percentage of waste in the RTS Transfer Facility destined for its site has in regards to the Agency's draft action. If only 10% was destined for RIS, would this change the Agency's position? 25%? 50%? Is it intended to somehow demonstrate that the RTS transfer area is simply being used by RIS merely as additional, unpermitted storage? The reality is, RIS is RTS' largest customer. So it seems reasonable that the majority of waste that sits in RTS' Transfer Facility is scheduled to be delivered to RIS. RIS shares a mutually beneficial business relationship with RTS which requires significant coordination between the parties. However, RIS receives waste from a number of other carriers and not exclusively RTS. Many of RIS' customers have contract carriers or their own transporters who send

waste to RIS. Ultimately, it is the offerer of the waste who determines which carrier to use. RIS has no control or influence over these choices or business arrangements.

The Agency's misrepresentation of the two companies' activities and apparent indifference to the companies' multiple attempts to explain the entities corporate separateness raises additional concerns. On May 18, 2007, RES, on behalf of RIS and RTS submitted a response to the Agency's request to upgrade the RTS Transfer Facility to certain technical standards. In this response, RES delineated the multiple reasons why it did not agree with the Agency's proposal, including arguments supporting the separateness of the operating companies, some of which are reiterated below.

Each of the RCC subsidiaries operate as separate and distinct entities. For instance, each has:

- **its own Officers and Directors,**
- **separate executive management and staff,**
- **independent financial transactions (bank accounts, debtors and creditors, assets, tax filings, accounting records and financial statements, Federal Tax ID numbers, etc.),**
- **unique federal EPA Identification numbers (applicable only to RIS and RTS)**
- **different Standard Industrial Classification ("SIC") codes established by the US Census Bureau to identify processes, products and services**
- **different North American Industrial Classification System ("NAICS") codes which were established with the passage of the North American Free Trade Agreement ("NAFTA") to replace the SIC code system for many reporting purposes; and**
- **separate regulatory compliance requirements and regulating agencies.**

While it may appear to the Agency that the Ross companies' corporate structure exists merely for legal liability purposes, the three operating companies conduct business with each other in the same manner as they do with their other respective vendors and customers. RES, the primary

contracting authority, has relationships with customers in a variety of industries, and maintains a significant vendor network to provide those customers full service in a variety of treatment, disposal, and recycling options. RIS and RTS are two such vendors. Service contracts exist between all three entities, and conventional transactions (e.g., quotes, Waste Management Agreements, contract orders, invoicing, etc.) occur as a normal course of business. RTS provides the same level of service, obligations, schedules, expectations, equipment, and hours of service to RES and RIS as it does any other customer or final destination facility to which or for which it ships waste or commodities. While RES provides logistical services to RTS under contract, RIS does not participate in any operational decisions made at RTS with regards to transportation logistics, scheduling, commodities or waste held in the Transfer Facility, or the final destination facility. These decisions are made by the shipper of the commodities or waste with RTS. Likewise, RTS does not participate in any operational decisions made at RIS with regard to waste profiling, acceptance, storage and treatment. These decisions are made by RIS in compliance with its permits and applicable Federal and State of Ohio regulations.

RTS operates in compliance with the Federal and State of Ohio regulatory requirements for a transporter of hazardous waste under OAC 3745-53 and 40 CFR 263. *RTS does not operate as a hazardous waste treatment, storage or disposal facility ("TSDF").* It does not treat, store or dispose of hazardous waste as those terms are defined under Federal and State regulations for purposes of RCRA permitting and compliance. Likewise, RTS does not operate a "facility" or "hazardous waste facility" as those terms are defined under OAC 3745-50-10 (39) and 40 CFR 260.10.

Conversely, RIS is permitted and regulated under RCRA as a TSDF. RIS has been issued a RCRA Part B Permit by the United States Environmental Protection Agency ("USEPA"), and a Hazardous Waste Facility RCRA Part B Permit from Ohio EPA for its hazardous waste storage and treatment activities. *RIS does not operate as a transportation company.* RIS does not own or operate any transportation vehicles, or have

contract carrier authority or authorization for the transportation of hazardous waste.

Additional differences and separations among the companies include:

Separate Permitting / Registration Status: Due to the separate nature of their businesses, RTS and RIS are subject to different permitting requirements by applicable Federal and State agencies. Whereas RTS has Hazardous Waste Transporter permits in 34 states, RIS carries multiple environmental permits, such as its Federal RCRA Part B permit, its Ohio Hazardous Waste Facility Part B Permit (02-47-0295), its Ohio Title V Air Permit (02-47-05-0278) and a USEPA NPDES Stormwater Permit (OHR00002).

Separate Regulatory Compliance Requirements: Because it operates as a commercial transporter and carrier, RTS complies with its own distinct regulatory, training, inspection, recordkeeping and reporting requirements, separate from RIS. Further, RTS (and not RIS) is subject to motor carrier regulations administered by the Ohio Public Utilities Commission ("PUCO") through the Ohio Department of Transportation ("ODOT"). RTS must comply with regulations set forth for transporters set forth in 40 CFR 263 - *Transporters of Hazardous Waste*, 49 CFR 177 - *Carriage by Public Highway*, OAC 3745-53 - *Transporters of Hazardous Waste*, and OAC 4901:2 - *Motor Carriers*.

RIS must comply with standards set forth for hazardous waste TSDFs: 40 CFR 264 - *Standards for Owners and Operators of TSDFs*, 49 CFR 173 - *Shippers*, OAC 3745-52 - *Generators of Hazardous Waste*, OAC 3745-54 - *Standards for the Management of Hazardous Waste*, OAC 3745-55 - *Closure and Post-Closure*.

Separate SIC and NAICS Codes: Standard Industrial Classification ("SIC") codes are established by the US Census Bureau to identify processes, products and services. Typically, USEPA uses SIC codes in its various permitting and reporting data systems (e.g., Toxic Release Inventory

reporting). The SIC code most applicable to RTS is 4213 – "Waste hauling, hazardous." The SIC code most applicable to RIS is 4953 – "Refuse Systems." Similarly, North American Industrial Classification System ("NAICS") codes were established with the passage of the North American Free Trade Agreement to replace the SIC code system for many reporting purposes. The NAICS code most applicable to RTS is 484220 – "Waste hauling, hazardous." The NAICS code most applicable to RIS is 562211 "Hazardous waste treatment and disposal."

Separate EPA ID Numbers: A unique EPA Identification (ID) number is assigned by USEPA to each hazardous waste generator; hazardous waste transporter; and TSDFs; among others. EPA ID numbers are site-specific, and need only be obtained once, although the generator should update the state or Region if his or her waste activities change. Each EPA ID number consists of twelve alphanumeric characters. The first two letters are simply the two-letter abbreviation for the state in which the facility is located; whereas, the third character is either a number or letter indicating the "type" of ID number. A nine-digit number uniquely associated with the site follows these first three characters.

RTS and RIS have each been issued their own unique US EPA ID numbers:

RTS – OHD 980 614 374
RIS – OHD 048 415 665

Important to note is the Ohio EPA's recent action pertaining to RTS' EPA ID number. In January, 2009, the Ohio EPA issued notification to RIS that it intended to initiate a permit action to,

'incorporate the Ross Transportation Services, Inc. (RTS) 10-day transfer storage activities and/or operations located on property contiguous to the RIS facility into RIS's permit as a hazardous waste container storage unit, subject to the container storage requirements of OAC rules 3745-55-70 to 3745-55-78.'

In this correspondence, the Ohio EPA presented its position that the waste is no longer in the "normal course of transportation once it has arrived at the destination facility." It further stated:

'The Transportation Standards in OAC Chapter 3745-53 are inapplicable to the on-site transportation of hazardous waste at permitted hazardous waste facilities. As such, RTS and its hazardous waste management activities are subject to the hazardous waste permitting requirements.'

RIS, by and through legal counsel, responded that the Ohio EPA lacked the appropriate regulatory authority to modify RIS' RCRA Part B Permit in this manner, and reiterated its position that RIS neither leased nor controlled the Transfer Facility which was the subject of the action.

Response to RIS Comment 1:

At issue is the appropriate regulatory standard applicable to transfer facility activities managing hazardous waste manifested to a designated facility where the transfer facility itself is located on property contiguous to that designated facility. The designated facility is the hazardous waste facility that has been designated on the manifest (by the generator pursuant to OAC rule 3745-52-20) as the facility which is permitted to handle the waste described on the manifest.

A transfer facility is defined by OAC rule 3745-50-10 to be "any transportation-related facility including loading docks, parking areas, storage areas and other similar areas *where shipments of hazardous waste are held during the normal course of transportation.*" (Emphasis added) In general, transfer facilities are exempt from permitting requirements for the storage of hazardous waste under OAC rule 3745-53-12. When allowing for this exemption, U.S. EPA recognized the reality of the transportation of hazardous waste and that it warranted relief from some management standards for the temporary storage of hazardous waste during the normal course of transportation. The term "transportation" is defined to mean "the movement of hazardous waste by air, rail, highway, or water" (OAC rule 3745-50-10).

In order to meet the eligibility requirements for the exemption from the permitting requirements, a "transfer facility" needs to meet and comply with the standards in OAC Chapter 3745-53. The applicability requirement (OAC rule 3745-53-10(B)) states that this chapter (and therefore the permit exemption for transfer facilities) does not apply to the on-site transportation of hazardous waste at permitted hazardous waste facilities (on-site is defined in OAC rule 3745-50-10 to mean "… the same or geographically contiguous property …"

The Ohio EPA's position is that if the "transfer facilities" are on contiguous pieces of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation to which OAC Chapter 3745-53 does not apply. Therefore, a transfer facility cannot be located on the same contiguous piece of property, i.e., on-site, as a designated facility.

All permitted hazardous waste facilities have been informed of our regulatory interpretation that if a transfer facility is being operated either at its facility or on a piece of property contiguous to their facility, the permitted hazardous waste facility cannot be the designated facility. The transfer facility may continue to operate under the regulatory exemption for hazardous waste which has been designated to other permitted facilities.

Pursuant to the January 2009 correspondence from Ohio EPA and a conference call on or about February 26, 2009, the issue of whether RTS could continue to utilize this ID number for transportation purposes was held in abeyance pending the outcome of the resolution of the issues raised by the current permit modification.

RIS Comment 2: Adding RTS as co-operator

The Ohio EPA's draft permit adds the following conditions to Module C – Containers Storage & Management *(as italicized)*:

'Containers of hazardous waste are stored in 1) Bulk Storage Area (BSA), 2) Oxidizer Storage Building (OSB), *3) RTS Transfer Storage Area* and 4) Container Storage Facility'

'The Transfer Storage Area is outdoors in the southeast portion of the facility. Containerized waste destined for Ross Incineration Services, Inc. historically has been stored at the Transfer Storage Area in truck tankers, roll-offs and semi-trailers. '

This draft permit condition essentially forces RIS to take control of the property appropriated by the Ohio EPA which represents the area currently used by RTS as its Transfer Facility, in order to create a permitted storage area for the receipt of wastes into the facility. It has long been the hazardous waste industry's postion concerning the Agency's resolve that all waste be received at a facility directly into permitted units is unreasonable, burdensome, and unnecessary. RIS again questions the Ohio EPA's authority to force one company to operate property appropriated by the Ohio EPA in order to achieve this objective. RIS would incur a significant financial burden of approximately $1 million to cover the capital improvements and wholesale changes to its receiving process as a result of being forced to incorporate this area into its permit. Ohio EPA has exceeded its regulatory authority and statutory mandate in establishing these permit conditions as RCRA operating permit requirements. There are no Federal or State laws or regulations that grant Ohio EPA the authority to force one company to appropriate land from another.

Response to RIS Comment 2:

The modification is not an appropriation by Ohio EPA.

Based upon our interpretation of the transfer facility regulations, RTS's "transfer facility" is not afforded the exemption from permitting requirements since it receives and stores hazardous waste that is destined for RIS. In order for the transfer facility to operate under the exemption found in OAC rule 3745-53-12, hazardous waste received at the transfer facility cannot have RIS as its designated facility. Absent the regulatory exemption, a permit is required of the owner or operator for the storage and management of hazardous waste destined for RIS. (See Response to RTS/RIS Comment 1 discussing ORC Section 3734.02(E) and (F))

ORC Section 3734.05(I)(2) provides the authority for the director to modify an existing permit. Ohio EPA began a dialogue with RTS/RIS in early 2004 to seek an amicable resolution of the transfer facility issue. Although Ohio EPA offered several regulatory options and compliance time frames for addressing the issue, RTS/RIS have not agree to any proposal short of their current arrangement. This decision on RTS/RIS's part constitutes new information that justifies permit conditions in addition to or different from those in the existing permit as articulated in the director's draft modification.

Owner is defined in OAC rules 3745-50-10 and 3745-50-52 and speaks in terms of ownership of a facility. The term "facility" is defined in OAC rule 3745-50-10 to mean "all contiguous land, and structures, other appurtenances, and improvements on the land, used for …storing…hazardous waste." Thus the owner is the person who holds title to the real property, structures and fixtures. RCC holds title to real property including the parcel upon which the transfer facility is situated, and RIS owns appurtenances or fixtures used for storage and treatment of hazardous waste thus both are owners of this facility. The Ohio EPA has no information that RTS owns fixtures or appurtenances used for storage of hazardous waste. The Ohio EPA's position is that there is one facility, with at least two owners.

The term "operator" is defined in OAC rules 3745-50-10 and 3745-50-52 as the person responsible for the overall operation of the facility. To the extent RTS manages waste manifested to RIS at its transfer operation and is responsible for its day-to-day operation, RTS is conducting storage and is an operator of a portion of the facility. RIS is also an operator and responsible for day-to-day operations of its portion of the facility. Thus there are also two operators of this single facility.

Ohio EPA does not dispute that RTS and RIS are distinct business operations and wholly-owned subsidiaries of the same parent company, RCC. However, there is no provision in state law that prevents separate business entities from being co-permittees on a hazardous waste permit. RCC is already identified (along with RIS)

on the current RIS hazardous waste permit as an owner for the 36790 Giles Road location.

RIS Comment 3: Benefits of Transfer Facility Current Location

Given that the purpose of a transfer facility is to pass or convey title to hazardous waste from one person to another, it would be beneficial in accomplishing its purpose to have a transfer facility as close as possible to its "designated facility". This is precisely why a transfer facility, contiguous to a designated facility, is not only acceptable but *preferred*. The question the Director must answer is what environmental benefit is served by separating a transfer facility and the designated facility by a public highway? There are no benefits that come to mind. In fact, common sense dictates just the opposite. The closer a transfer facility is to the designated facility, the safer the transfer of title and conveyance of hazardous waste will be.

That is the case with RTS and RIS. At its current location, the RTS Transfer Facility is actually more beneficial to public health, safety and the environment, and therefore preferable over a remote location where services like security, emergency response, health services, etc. are unavailable or less readily available. Due to its unique, close proximity to a RCRA Part B permitted facility (i.e., RIS), RTS has been able to meet the highest standards possible for a 10-day Transfer Facility, and operate in the most safe and environmentally protective way possible. By operating the 10-day Transfer Facility at its existing location for nearly 30 years without significant injury or incident, RTS has demonstrated that such activities can be conducted contiguous to a RCRA Part B permitted facility in a manner that is protective to public health and safety, and the environment. The same cannot always be said for transfer facilities which are operated from a remote location and/or some distance from their final destination facilities.

For instance, in the event of a hazardous materials incident while a shipment is in the Transfer Facility, RTS can rely on assistance from RIS trained personnel for immediate

response. Service agreements between the two companies commit RIS' Emergency Response Team ("ERT") which is made up of some 35 specifically trained personnel, as well as RTS employees, to help with clean up and mitigation as appropriate. RIS' ERT is trained in accordance with the Occupational Safety and Health Administration's ("OSHA's") 29 CFR 1910.120 "Hazardous Waste Operations and Emergency Response" standards. In addition, RTS has an RIS emergency coordinator available for supervising emergency response activities 24 hours per day.

Additionally, should an event occur that requires the assistance of outside authorities, the Eaton Township Fire Department is less than one mile from the two facilities, and can typically respond to a call within five to ten minutes. In addition, the Lorain County Sheriff's Department operates a post less than one mile from the two facilities and, depending on demand, can respond to a call within 15 minutes. Finally, the EMH Regional Health Care and its adjoining Emergency Center are located within a 10 to 15 minute drive from the facilities. Coordination agreements are in place with each of these local authorities to assist in the event of an emergency.

Moreover, both properties are surrounded by a six-foot high chain link, barbed wire fence. Signs with the legend *"Danger – Unauthorized Personnel Keep Out"* are posted at each entrance to the facility, and at other locations on the fence, such that they can be seen from any approach to the active portions of the site. The operating areas of both facilities are well lit for both operating and security purposes. Inventory in the 10-day Transfer Facility which is incidental to transportation is managed by RTS employees, and is tracked by a computer management system.

Since the two facilities share a gated, main entrance which is controlled by a security guard at all times (24 hours per day, 7 days per week), all employees, visitors, deliveries and shipments must have appropriate clearance from the security guard before entering or departing these facilities. All employees are required to carry at least two forms of identification and present them upon request. Visitors (e.g.,

outside carrier drivers) are logged into the facility by the security guard each time they enter, and are required to present employer identification for verification against shipment or contractor schedules and/or shipping papers. Visitors are required to wear visitor identification badges while on the facility premises. With some exceptions for outside carriers who have the appropriate training, agreements and security clearance, all visitors are escorted by site personnel at all times.

Finally, as the Agency is aware, RIS has been assigned two full-time Division of Hazardous Waste Management ("DHWM") inspectors from Ohio EPA's Northeast District Office. These inspectors are often on-site at RIS (two to three times per week), and have access to the RTS 10-day Transfer Facility, which they pass as part of visits to the RIS process and storage areas. Due to the current access which Ohio EPA's DHWM has to RTS, this enables the Transfer Facility to be monitored more readily if necessary, due to its unique location. Ohio EPA's inspectors may not have such ready access if the Transfer Facility was relocated. In addition, there does not appear to be an administrative mechanism for Ohio EPA to identify those locations that operate a 10-day transfer facilities, since these locations are exempt from RCRA requirements. Due to the close proximity of RTS to RIS, its 10-day Transfer Facility is accessible, through RTS' voluntary cooperation, to much more oversight by Ohio EPA than other such transfer facilities located elsewhere in the State.

The Agency-initiated permit modification prohibits RTS' use of the transfer station for any waste destined for RIS. If RIS declines to upgrade the area and make it part of its permit, then RTS would be forced to find another suitable location for a Transfer Facility to accommodate the waste to be delivered to RIS. Not only would such a property be difficult to locate given the zoning resolutions in many nearby municipalities, it would also be costly for RTS to acquire and potentially contentious for the nearby communities.

Ultimately, there is no practical environmental benefit to moving a 10-day transfer facility to a non-contiguous location

compared to its existing location where emergency response capabilities and regulatory compliance assistance already exist. From an environmental impact perspective, it is more environmentally protective to have the existing transfer station at its present location where such transfer activities have occurred safely for almost 30 years, than to develop another commercial or "virgin" piece of property for transfer usage. The use of a remote transfer facility off-site also encourages additional unnecessary movement of hazardous waste over public highways.

Response to RIS Comment 3:

Ohio EPA's analysis begins with applicable law necessary for the protection of human health and the environment. As described in Ohio EPA's responses throughout this Responsiveness Summary, the transfer facility exclusion is inapplicable to RTS for hazardous waste designated to RIS. Instead, the law requires the management and movement of such hazardous waste be regulated under a hazardous waste permit and accompanying regulatory requirements. These regulations prescribe general operating practices for all hazardous waste management facilities as well as set specific requirements for storage of hazardous waste (e.g., preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, waste analysis, security at facilities, inspection requirements, and personnel training). The permit and regulations create enforceable legal duties the owner or operator must comply with for the protection of the public and the environment. The practices and agreements described in the RIS comment are voluntary or contractual agreements subject to change between the parties and not, for Ohio EPA, enforceable legal obligations based on applicable law for the protection of the public.

Comments from Counsel for RIS and RTS- Wickens, Herzer, Panza, Cook & Batista Co. (WHP)

WHP Comment 1: There are a number of regulations which are applicable to this situation. Despite the fact that the citations have changed over the years, neither the law nor the definitions have been altered to any significant degree since 1981. Federal environmental regulations define transfer facility as follows:

Transfer facility means any transportation related facility including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste are held during the normal course of transportation.

40 C.F.R. § 260.10 (7-1-08 Edition). This is the identical definition utilized by Ohio environmental regulations, OAC 3745-50-10(A)(120). Furthermore, OAC 3745-53-12 provides as follows:

A transporter who stores manifested shipments of hazardous waste in containers meeting the requirements of Rule 3745-52-30 of the Administrative Code at a transfer facility for a period of ten days or less is not subject to regulation under Rules 3745-50-40 to 3745-50-66 and Chapters 3745-54 to 3745-57, 3745-65 to 3745-69, 3745-205, 3745-256, and 3745-270 of the Administrative Code, with respect to the storage of those wastes.

For the identical federal regulation, I refer you to 40 C.F.R. § 263.12 (7-1-08 Edition). Therefore, from these regulations, we can conclude that RTS has the legal right to store hazardous waste in any parking or storage area for less than ten days without compliance with OAC Chapters 3745-54 to 3745-57.

Response to WHP Comment 1:

At issue is the appropriate regulatory standard applicable to transfer facility activities managing hazardous waste manifested to a designated facility where the transfer facility itself is located on property contiguous to that designated facility. The designated facility is the hazardous waste facility that has been designated on

the manifest (by the generator pursuant to OAC rule 3745-52-20) as the facility which is permitted to handle the waste described on the manifest.

A transfer facility is defined by OAC rule 3745-50-10 to be "any transportation-related facility including loading docks, parking areas, storage areas and other similar areas *where shipments of hazardous waste are held during the normal course of transportation*." (Emphasis added) In general, transfer facilities are exempt from permitting requirements for the storage of hazardous waste under OAC rule 3745-53-12. When allowing for this exemption, U.S. EPA recognized the reality of the transportation of hazardous waste and that it warranted relief from some management standards for the temporary storage of hazardous waste during the normal course of transportation.

In order to meet the eligibility requirements for the exemption from the permitting requirements, a "transfer facility" needs to meet and comply with the standards in OAC Chapter 3745-53. The applicability requirement (OAC rule 3745-53-10(B)) states that this chapter (and therefore the permit exemption for transfer facilities) does not apply to the on-site transportation of hazardous waste at permitted hazardous waste facilities (on-site is defined in OAC rule 3745-50-10).

The Ohio EPA's position is that if the "transfer facilities" are on contiguous pieces of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation to which OAC Chapter 3745-53 does not apply. Therefore, a transfer facility cannot be located on the same contiguous piece of property, i.e., on-site, as a designated facility (the designated facility is the hazardous waste facility that has been designated on the manifest by the generator pursuant to OAC rule 3745-52-20).

All permitted hazardous waste facilities have been informed of our regulatory interpretation that if a transfer facility is being operated either at its facility or on a piece of property contiguous to their facility, the permitted hazardous waste facility cannot be the designated facility. The transfer facility may continue to operate

under the regulatory exemption for wastes which have been designated to other permitted facilities.

WHP Comment 2: **There is no dispute that RTS is a legitimately licensed transporter of hazardous waste with separate and distinct functions from RIS, a legitimately licensed TSDF. Furthermore, there can be no dispute that although both companies have the same address, for mailing convenience, the property leased to RTS is not under the supervision or control of RIS, or the Ohio EPA, as a result of RIS' Part B permit. This, of course, is the reason for the Director's proposed modification. However, because the transfer facility is not part of the RIS facility, delivery of the waste by RTS to the transfer facility does not constitute delivery to a "designated facility" or a "destination facility."**

OAC 3745-50-10(A)(21) defines "designated facility" as follows:

"Designated facility" means a hazardous waste treatment, storage, or disposal facility: (a) Which has received an Ohio hazardous waste permit or is deemed to have a permit by rule, or (b) In another state, which has attained interim status or is operating under a permit or license issued in accordance with the Resource Conservation and Recovery Act, or (c) That is regulated under paragraph (C)(2) of Rule 3745-51-06 or Rule 3745-266-70 of the Administrative Code, and (d) That has been designated on the manifest by the generator pursuant to Rule 3 745-52-20 of the Administrative Code.

Likewise, OAC 3745-50-10(A)(22) defines "destination facility" as follows:

"Destination facility" means a facility that treats, disposes of, or recycles a particular category of universal waste... [a] facility at which a particular category of universal waste is only accumulated, is not a destination facility for purposes of managing that category of universal waste.

Furthermore, OAC 3745-50-10(A)(39) defines "facility" as follows:

(a) All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(b) For the purpose of implementing corrective action. . . all contiguous property under the control of the owner or operator seeking a permit under Subtitle C of RCRA the hazardous waste rules.

Therefore, it is readily apparent that the transfer facility under separate lease and in the control of RTS is not, by definition, a "facility," under OAC 3745-50-10(A)(39), a "designated facility" under OAC 3745-50-10(A)21 or a "destination facility" under OAC 3745-50-10(A)(22) for the fundamental reason that RTS and RIS are not the same "person" as that term is defined by OAC 3745-50-10(A)(88). There is no federal or state law which regulates two "persons" or two separately owned facilities under one hazardous waste permit. However, that is what the Ohio EPA is attempting to do with the Director's proposed modification. The Director's modification is illegal and constitutes a confiscation of RTS' property without compensation in violation of Article I, Section 19 of the Ohio Constitution.

Response to WHP Comment 2:

RIS, located in Grafton, Ohio, is a permitted commercial hazardous waste treatment and storage company whose primary activity is treatment of hazardous waste by incineration. RIS is a wholly owned subsidiary of RCC, an Ohio holding corporation. RTS, also a wholly owned subsidiary of RCC, transfers hazardous waste from customers to a transfer facility which is located on the same contiguous property as RIS. The transfer facility is owned and operated by RTS. Based upon our interpretation of the transfer facility regulations, RTS's "transfer facility" is not afforded the

exemption from permitting requirements since it receives and stores hazardous waste that is destined for RIS. In order for the transfer facility to operate under the exemption found in OAC rule 3745-53-12, hazardous waste received at the transfer facility cannot have RIS as its designated facility.

Owner is defined in OAC rules 3745-50-10 and 3745-50-52 and speaks in terms of ownership of a facility. The term "facility" is defined in OAC rule 3745-50-10 to mean "all contiguous land, and structures, other appurtenances, and improvements on the land, used for …storing…hazardous waste." Thus the owner is the person who holds title to the real property, structures and fixtures. RCC holds title to real property including the parcel upon which the transfer facility is situated, and RIS owns appurtenances or fixtures used for storage and treatment of hazardous waste thus both are owners of this facility. The Ohio EPA has no information that RTS owns fixtures or appurtenances used for storage of hazardous waste. The Ohio EPA's position is that there is one facility, with at least two owners.

The term "operator" is defined in OAC rules 3745-50-10 and 3745-50-52 as the person responsible for the overall operation of the facility. To the extent RTS manages waste manifested to RIS at its transfer operation and is responsible for its day-to-day operation, RTS is conducting storage and is an operator of a portion of the facility. RIS is also an operator and responsible for day-to-day operations of its portion of the facility. Thus there are also two operators of this single facility.

Ohio EPA does not dispute that RTS and RIS are distinct business operations and wholly-owned subsidiaries of the same parent company, RCC. However, there is no provision in state law that prevents separate business entities from being co-permittees on a hazardous waste permit. RCC is already identified (along with RIS) on the current RIS hazardous waste permit as an owner for the 36790 Giles Road location. (http://www.epa.ohio.gov/portals/32/permits/RossPermit.pdf)

WHP Comment 3: A transfer facility is an integral part of the normal course of the transportation process. It is the part of the process that is utilized at the end of the delivery process. There are other

portions of the process such as pick-up and/or actual hauling; however, a transfer facility contemplates by its very definition its utilization after delivery has been completed. This is clear from the word transfer itself. The Heritage Dictionary, 3rd Edition, copyright 1992 defines "transfer" as follows:

"transfer 1. to convey or cause to pass from one place, person or thing to another. 2. to make over the possession or legal title of; convey."

In the normal course of transportation, the function of a transfer facility is to pass or convey title to hazardous waste from one person to another. This would appear to be a transfer facility's primary purpose. To that end, it would be beneficial in accomplishing its purpose to have the transfer facility as close as possible to its "designated facility." This is precisely why a transfer facility, contiguous to a designated facility, is not only permitted but preferred. The question the Director must answer is what environmental benefit is served by separating the transfer facility and the designated facility by a public highway? There are no benefits that come to mind. In fact, common sense dictates just the opposite. The closer the transfer facility is to the designated facility, the safer the transfer of title and conveyance of hazardous waste will be. That is the case with RTS and RIS.

Response to WHP Comment 3:

The Agency cannot agree that the term transfer facility as used in the rule refers to the end of the transportation process. In the normal course of transportation, the purpose or function of the transfer facility is to consolidate and redirect shipments in order to have a more efficient and economical transportation system.

U.S. EPA authored the rule on "transfer facility" at the beginning of the national hazardous waste program. The regulatory context of "transfer facility" and the associated terms used to define it are articulated by U.S. EPA in a December 1980 preamble as a part of the Agency rulemaking (as an Interim Final Amendment) clarifying when a transporter handling shipments of hazardous waste is required to obtain a hazardous waste storage facility permit.

In May of 1980, U.S. EPA promulgated regulations (45 FR 33154, May 19, 1980) establishing standards and permitting requirements applicable to owners and operators of hazardous waste management facilities. These regulations prescribe general operating practices for all hazardous waste management facilities as well as set specific requirements for storage of hazardous waste (e.g., preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, waste analysis, security at facilities, inspection requirements, and personnel training). However, in the development of these rules, U.S. EPA was asked by the transportation industry whether U.S. EPA intended to require transporters to file permit applications and comply with the substantive standards of storage.

U.S. EPA acknowledged that a literal application of the regulations might require all transporters to obtain a RCRA permit for storage of hazardous waste. U.S. EPA recognized that many transporters operated transfer facilities (also known as “break bulk” facilities) where shipments are consolidated into larger units, or shipments may be transferred to other vehicles for re-directing or re-routing. The term “transfer facility,” as used in the December 1980 rulemaking, refers to transportation terminals (including vehicle parking areas, loading docks and other similar areas) break-bulk facilities or any other facility commonly used by transporters to temporarily hold shipments of hazardous waste during transportation (see 45 FR 86966). U.S. EPA’s premise for this regulation was that transfer facilities “are intended to facilitate transportation activities, rather than storage”, thus, they reasoned, any of the in-transit holding times are as short as practicable therefore justifying a brief exemption from permitting.

As a result, U.S. EPA promulgated the transfer facility rule on December 30, 1980 (45 FR 86966) allowing transporters who hold hazardous waste for short periods of time while in the course of transportation to be exempted from the permitting requirements. This rule accommodates normal and routine in-transit transfer activities of transporters which tend to facilitate movement of hazardous waste to the ultimate treatment, storage or disposal facility specified on the waste manifest rather than storage. Ohio EPA adopted this definition effective August 26, 1981.

Siting and operating a transfer operation on property contiguous to a RCRA permitted storage facility facilitates storage (i.e., increased storage capacity) rather than facilitates transportation activities when the permitted facility is also the designated facility on the transporter's waste manifest. In this context, the RTS operation is not a transfer facility under OAC rule 3745-50-10.

OAC rule 3745-50-10 defines a transfer facility as:

"… any transportation-related facility including loading docks, parking areas, storage areas and other similar areas where shipments of hazardous waste are held during *the normal course of transportation*." (Emphasis added)

Thus, if a transfer operation is located on a contiguous piece of property with the designated facility, the normal course of transportation has ceased, and any further movement of the waste would be on-site transportation, an activity to which OAC Chapter 3745-53 does not apply. Ohio EPA has consistently enforced this position throughout the state – no other permitted facility in Ohio operates a transfer facility on contiguous property in this manner.

Absent a regulatory exclusion (ORC Section 3734.02(E)) a permit is required for the treatment, storage, or disposal of hazardous waste.

ORC Section 3734.02(E) sets forth that "no person shall establish or operate a hazardous waste facility… for the storage, treatment, or disposal of any hazardous waste, without a hazardous waste facility installation and operation permit…" Except that "the prohibition against establishing or operating a hazardous waste facility without a hazardous waste facility installation and operation permit does not apply to ...a facility … that is not subject to permit requirements, under rules adopted by the director." (ORC Section 3734.02(E)(3))

Division (F) of ORC Section 3734.02 requires that: "(F) No person shall store, treat, or dispose of hazardous … except at or to any of the following: (1) A hazardous waste facility operating under a permit issued in accordance with this chapter;…(5) A hazardous waste facility as described in division (E)(3)(b) of this section."

The mandate of ORC Section 3734 is clear. A person must comply with ORC Section 3734.02(E) and (F) before conducting treatment, storage or disposal activities at a facility.

In terms of environmental benefit, Ohio EPA's analysis begins with applicable law necessary for the protection of human health and the environment. As described in Ohio EPA's responses throughout this Responsiveness Summary, the transfer facility exclusion is inapplicable to RTS for hazardous waste designated to RIS. Instead, the law requires the management and movement of such hazardous waste be regulated under a hazardous waste permit and accompanying regulatory requirements. These regulations prescribe general operating practices for all hazardous waste management facilities as well as set specific requirements for storage of hazardous waste (e.g., preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, waste analysis, security at facilities, inspection requirements, and personnel training). The permit and regulations create enforceable legal duties the owner or operator must comply with for the protection of the public and the environment.

Allowing a 10-day transfer facility to operate on contiguous property with a permitted facility as advocated by the commenter would significantly undermine Ohio EPA's hazardous waste permitting authority. For example, a facility denied a permit for an increase in storage capacity by director's action could simply circumvent the denial by creating a transfer facility instead. This is clearly not U.S. EPA's intent when creating the transfer facility requirements for waste in the "normal course of transportation" and as noted above, is inconsistent with Ohio law.

WHP Comment 4: **At its current location, the RTS transfer facility is actually more beneficial to public health, safety and the environment, and therefore preferable over a remote location where services like security, emergency response, health services, etc., are unavailable or less readily available. Due to its unique, close proximity to a RCRA Part B permitted facility (i.e., RIS), RTS has been able to meet the highest standards possible for a 10-day hazardous waste transfer facility, and operate in the most safe and environmentally protective way possible. By operating the 10-day transfer facility at its existing location for**

nearly 20 years without significant injury or incident, RTS has demonstrated that such activities can be conducted contiguous to a RCRA Part B permitted facility in a manner that is protective to public health and safety, and the environment. The same cannot always be said for transfer facilities which are operated from a remote location and/or some distance from their final destination facilities.

Response to WHP Comment 4:

Ohio EPA has not done an extensive evaluation of the historic waste management activities at the "transfer facility" portion of the property because it is not a basis for the director's draft permit modification. However, our records show that RTS filed an annual hazardous waste report for generation of waste at the "transfer facility" for the calendar year 2006. RTS's report indicates that 15.3 tons of hazardous waste contaminated soil from a spill cleanup was generated at that location in 2006. The director's draft action seeks construction of secondary containment that would contain spills and prevent the release of hazardous waste into the underlying soil.

WHP Comment 5: **The following capabilities have enabled RTS to operate its 10-day transfer facility on property contiguous to RIS without adversely affecting public health, safety or the environment. Further, due to its unique setting next to a TSDF, many of these beneficial services would not be as readily available (or available at all) if RTS was not located next to RIS, and was conducting its 10-day transfer facility activities at another separate location.**

EMERGENCY PREPAREDNESS AND RESPONSE CAPABILITIES: In the event of a hazardous materials incident, RTS can rely on assistance from RIS trained personnel for immediate response. Service agreements between the Ross companies commit RIS' Emergency Response Team (ERT) which is made up of some 35 specifically trained personnel, as well as RTS employees, to help with clean up and mitigation as appropriate. RIS' ERT is trained in accordance with OSHA's 29 CFR 1910.120 "Hazardous Waste Operations and Emergency Response" standards. In addition, RTS has an emergency

coordinator available for supervising emergency response activities 24 hours per day.

RTS also has a written Emergency Response Plan for chemical transportation accidents which identifies individual responsibilities. All drivers have been given copies of this Plan and are trained to respond in the event of a release during transportation. RIS ERT members are available to assist in a transportation related incident.

LOCAL EMERGENCY AUTHORITY AVAILABILITY: In the event of an emergency at the 10-day transfer facility which requires the assistance of outside authorities, the estimated response time for local police, fire and rescue services varies, depending on time and day. Nevertheless, the Eaton Township Fire Department is less than one mile from RTS, and can typically respond to a call within five to ten minutes. In addition, the Lorain County Sheriff's Department operates a post less than one mile from the RTS facility and, depending on demand, can respond to a call within 15 minutes. Finally, the Elyria Memorial Hospital and its adjoining Emergency Center are located within a 10 to 15 minute drive from RTS. Coordination agreements are in place with each of these local authorities to assist in the event of an emergency.

TRAINING: RTS managers and supervisors receive formal training on applicable regulations, security policies and plans, threat and incident reporting, and associated procedures. All RTS personnel complete a program of classroom instruction (Awareness Level and In-Depth Security Plan) and on-the-job training that teaches them to perform their duties in a way that ensures employee and public safety, as well as compliance with applicable Federal and State regulatory requirements.

New drivers receive 60 to 120 hours of on-the-job training on topics such as RTS paperwork, drum condition requirements, manifest requirements, US DOT regulations (including hazardous materials handling, safety and communication) and US EPA labeling requirements. Additionally, RTS conducts ongoing training on a quarterly basis, on topics including, but not limited to, speeding policy, alcohol/narcotics/drug abuse,

HAZMAT regulations, areas critical to security, loading/unloading practices, emergency response procedures, and emergency communications.

Due to its unique location next to a RCRA Permitted TSDF, this enables safety, health, environmental and hazardous materials cross-training and related communications to be conducted more readily between RTS and RIS, thus keeping each other abreast of ongoing compliance and operational requirements.

HEALTH & SAFETY: RTS has a history of no Federal transportation regulatory violations, and has achieved over 9 million "accident free" miles with its fleet of trucks. Recurrent training and routine internal inspections have contributed greatly to this achievement. In addition, RTS routinely conducts internal health and safety audits of its on-site facility. In frequent support, RIS maintains a staff of five full-time safety, health and environmental (SHE) professionals who routinely interact with RTS personnel and are responsible for:

- **Development of safety and health programs and policies,**
- **Compliance with standard operating procedures, and**
- **Day-to-day regulatory oversight of the RIS and RTS facilities.**

These SHE personnel help to provide an integral role in the RTS inspection and auditing program, including reviewing used oil and hazardous waste transportation activities. Finally, RIS' SHE staff assists with safety and health inspections, such as those for fire extinguishers, eyewashes, proper personnel protective equipment, and other safety concerns.

Internal audits of RTS are also conducted by its other "sister" company, RES, whose environmental professional staff of five personnel routinely perform such functions, in addition to training, regulatory interpretation, Security Plan review, consulting and other similar services to RTS.

SECURITY: Both the RTS and RIS contiguous properties are surrounded by a six-foot high chain link, barbed wire fence. Signs with the legend "Danger - Unauthorized Personnel Keep Out" are posted at each entrance to the facility, and at other locations on the fence, such that they can be seen from any approach to the active portions of the site. The operating areas of both facilities are well lit for both operating and security purposes. Inventory in the 10-day transfer facility which is incidental to transportation is managed by quality assurance / quality control RTS employees, and is tracked by a computer management system.

RIS and RTS share a gated, main entrance which is controlled by a security guard at all times (24 hours per day, 7 days per week). All employees, visitors, deliveries and shipments must have appropriate clearance from the security guard before entering or departing the facility. RTS employees are required to carry at least two forms of identification and present them upon request.

Visitors (e.g., outside carrier drivers) are logged into the facility by the security guard each time they enter, and are required to present employer identification for verification against shipment or contractor schedules and/or shipping papers. Visitors are required to wear visitor identification badges while on the facility premises. With some exceptions for outside carriers who have the appropriate training, agreements and security clearance, all visitors are escorted by RTS personnel at all times.

RTS has a written Security Plan which emphasizes the importance of protecting people, property, and operational practices against loss. In addition, RTS has established written security policies and procedures in accordance with US DOT hazardous materials regulations (HM-232), which require that persons who transport or offer for transportation hazardous materials in commerce establish security plans and provide security training to their hazmat employees.

En route security covers any risk to the hazardous materials in-transit from origin to destination, including shipments

stored incidental to transportation at the 10-day transfer facility. Access to hazardous materials by unauthorized personnel is controlled through vehicle security measures and facility access / security procedures.

RTS conducts background checks and verification of driver information, including criminal background checks, employment status verification and immigration paper verification. These checks are conducted in an effort to confirm information provided by job applicants for positions that involve access to and/or handling of hazardous materials. These background checks are reviewed and updated annually.

LOCATION ACCESSIBILITY: Both the RTS and RIS contiguous properties are located in a rural area of central Lorain County. Although the zoning in the area is nonconforming agricultural and residential, several transportation routes are accessible within 1/4 mile of the RTS facility. There are three State routes (i.e., Routes 82, 83 & 57) that provide excellent access. Interstate 480, a major highway, is less than five miles away, and the Ohio Turnpike (Interstate 80) is within ten miles of the facility (both Interstates run east - west). Additionally, Interstate 71 is within 15 miles of RTS and runs in a north - south direction.

Identifying another suitable non-contiguous property for RTS that is not occupied by residential, commercial and/or industrial entities may be difficult to locate. By requiring that a 10-day hazardous waste transfer facility cannot operate on property contiguous to a TSDF, Ohio EPA would be essentially identifying a "no transporter zone" around that TSDF, thus limiting accessibility, location, and scheduling options for such facilities in the State. In addition, alternative locations may not have such easy access to major State and Federal transportation routes. Also there is no practical environmental benefit to moving a 10-day hazardous waste transfer facility to a non-contiguous location compared to storing it at the existing RTS transfer facility where emergency response capabilities and regulatory compliance assistance already exist. From an environmental impact perspective, it is more environmentally protective to have the existing transfer station

at its present location where such transfer activities have occurred safely for almost 20 years, than to develop another commercial or "virgin" piece of property for hazardous waste transfer usage. Finally, the use of a remote transfer facility off-site also encourages additional unnecessary movement of hazardous waste over public highways.

PUBLIC PERCEPTION: There are also issues with public perception associated with relocating a 10-day hazardous waste transfer facility to a non-contiguous piece of property. While there hypothetically could be public concerns (although RTS knows of none) over storage at a 10-day transfer facility that is located on a contiguous site, there may be equal if not greater public apprehension over relocating that same transfer facility to a non-contiguous or remote location where the hazardous waste would need to be transported over a public right-of-way to the same TSDF. The public community may also have concerns with RTS being required to use a 10-day hazardous waste transfer facility that is located some distance from a RCRA TSDF, when by operating on adjoining property, RTS, with assistance from RIS, is currently far more equipped and ready to provide emergency assistance in the event of a spill, release, or other emergency.

COMMUNITY OUTREACH: The Ross Companies, including RTS, have historically enjoyed local community support without opposition to the transfer facility at its current location. Many RTS and other employees of the Ross Companies live and participate in community activities in the Grafton, Ohio, regional area, including RES' Public Relations Manager, who is a resident of Grafton. RES' Community Relations Department has been successful in keeping the local community informed and involved with activities at RTS and RIS through outreach programs, public meetings, newsletters and notices, RIS / RTS / RES tours, household hazardous waste collection events, etc.

GREATER OHIO EPA ACCESSIBILITY THAN AT OTHER FACILITIES: As the Agency is aware, RIS has been assigned two full-time Division of Hazardous Waste Management ("DHWM") inspectors from Ohio EPA's Northeast District

Office. These inspectors are often on-site at RIS (two to three times per week), and have informal access to the RTS 10-day hazardous waste transfer facility, which they pass as part of visits to the RIS process and storage areas. Due to the current access which Ohio EPA's DHWM has to RTS, this enables the transfer facility to be monitored more readily if necessary, due to its unique location. Ohio EPA's inspectors may not have such ready access if the transfer facility was relocated.

Response to WHP Comment 5:

For the reasons indicated in Response to WHP Comments 1 and 3, the RTS operation is not a transfer facility within the meaning of the rule.

Instead, the law requires the management and movement of such hazardous waste be regulated under a hazardous waste permit and accompanying regulatory requirements. These regulations prescribe general operating practices for all hazardous waste management facilities as well as set specific requirements for storage of hazardous waste (e.g., preparedness for and prevention of hazards, contingency planning and emergency procedures, the manifest system, waste analysis, security at facilities, inspection requirements, and personnel training). The permit and regulations create enforceable legal duties the owner or operator must comply with for the protection of the public and the environment.

The practices and agreements described in the RTS/RIS comments are voluntary or contractual agreements subject to change between the parties and not, for Ohio EPA, enforceable legal obligations based on applicable law for the protection of the public.

WHP Comment 6: **In addition, there does not appear to be an administrative mechanism for Ohio EPA to identify those locations that operate a 10-day hazardous waste transfer facility, since these locations are exempt from RCRA Permitting requirements. Due to the close proximity of RTS to RIS, its 10-day hazardous waste transfer facility is accessible, through RTS' voluntary cooperation, to much more oversight by Ohio EPA than other such transfer facilities located elsewhere in the State.**

There is no definition of what the phrase "...during the normal course of transportation" means. Furthermore, a review of both federal and state law fails to clarify the meaning of this phrase. The Heritage Dictionary, 3rd Edition, copyright 1992, defines "course" as the direction of continuing movement and "normal" as conforming with, adhering to or constituting a norm, standard, pattern, level or type; typical. From these definitions, we can conclude that "normal course" is subjective in nature and constitutes RTS's standard or normal practice. Furthermore, with respect to these definitional concepts, there is another which is directly relevant to this situation. It is the definition of "course of dealing." Black's Law Dictionary, Abridged Sixth Edition, West Publishing, 1991, defines "course of dealing" as follows:

A sequence of previous acts and conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

It is important to note two things. First, the definition of transfer facility does not prohibit the transfer facility from being located in a parking area immediately adjacent to the wastes' final destination. In fact, the definition includes the word "any" in conjunction with "parking area." This clearly means that any parking area, regardless of location, qualifies as a transfer facility. Second, since 1981, RTS has been utilizing the 2.63 acres in question with the knowledge of the Ohio EPA. RTS's use of this space as a transfer facility constitutes RTS's standard practice or normal course of transportation, and the Ohio EPA's failure to cite RTS for any improper use of such area, since 1981, constitutes both parties' course of dealing for the last twenty-eight years. This period of time includes the Part B permitting period wherein the Ohio EPA could have, but chose not to include the subject transfer facility area in RIS' permit. Ohio EPA issued RIS the permit in 2003.

Response to WHP Comment 6:

Regarding the definition of transfer facility see Response to WHP Comment 3. Regarding Ohio EPA's failure to cite RTS for improper use of the area, both Ohio EPA and RTS knew of each other's divergent views on the definition of transfer facility and both parties agreed to negotiate a resolution to the issue; see Response to WHP Comment 8.

This draft action to modify the permit is not the first time that we have raised this issue with RTS. During an August 1986 inspection, DHWM's Northeast District Office cited RTS with illegally storing hazardous waste without a permit, for the extended storage of hazardous waste, destined for RIS, at RTS's transfer facility. RTS appealed the October 1986 Notice of Violation (NOV) letter to Environmental Board of Review (EBR). On January 7, 1987, EBR dismissed RTS's appeal, after the parties stipulated that the NOV letter was not a final action of the director. RTS, RIS and Ohio EPA agreed to commence negotiations in attempt to resolve our differences concerning the meaning of the transfer facility exemption, and that prior to taking any enforcement action against RTS in this matter, Ohio EPA would notify RTS of the enforcement action. Until 2004, all three parties failed to initiate communications to commence negotiations as agreed.

On September 24, 2004, Ohio EPA contacted RIS/RTS to discuss our position regarding the operation of RTS's transfer facility. There were additional meetings and further discussions regarding the status of the transfer facility. During these meetings, we have informed RIS/RTS what we believe to be their options with regards to the transfer facility:

- Have RTS operate the transfer facility in compliance with the hazardous waste regulations. This would mean that hazardous waste received and stored at the transfer facility would not then be moved over to RIS for storage and treatment.
- Incorporate the transfer facility into RIS's hazardous waste permit as a storage area. This would require upgrading the transfer facility to meet applicable permit requirements and it would also require adding RTS on the permit as a co-operator.

- Incorporate the transfer facility into RIS's hazardous waste permit as a staging area. This would require upgrading the transfer facility to meet minimum technical standards for a staging area.
- Move the transfer facility so that it would no longer be considered on-site.

WHP Comment 7: While it is true that the Ohio EPA has, over the years, discussed the "transfer facility" issue with representatives of RTS and even, at various times, objected to its use, the Ohio EPA has never taken any final action to prevent RTS' use of the area as a transfer facility. In fact, for the last twenty-eight years, the Ohio EPA has attempted to avoid any final declaration concerning the propriety of the area's use as a transfer facility. This is evident from a review of the facts surrounding a case before the Environmental Review Appeals Commission, formerly known as the Environmental Board of Review, Case No. EBR471483, captioned Ross Transportation Services, Inc., et al. v. Warren W Tyler; Director. That case evolved from a letter received by RTS and RIS from Christine Mikoy Frazier, Environmental Scientist, Division of Solid and Hazardous Waste Management, Ohio EPA, dated October 7, 1986. In that letter, Ms. Frazier, on behalf of the Ohio EPA, directed RTS as follows:

You were advised that <u>extended</u> storage in Ross Transportation vehicles during waste verification is not exempted by the transfer facility regulations. This constitutes a violation of Ohio Revised Code (ORC) 3734.02(E) (storage without a permit by Ross Transportation). Within 30 days of receipt of this letter, you are advised to accept or reject all incoming waste within twenty-four hours of arrival at the facility. [Underline in original.]

RTS immediately appealed this decision to the Environmental Board of Review. The Director of the Ohio EPA, by and through counsel, moved to dismiss the appeal on the grounds that Ms. Frazier's letter failed to constitute a final appealable order. The parties subsequently agreed to a dismissal of the appeal and entered into certain stipulations whereby RTS, RIS and the Ohio EPA agreed as follows:

1. The October 7, 1986 letter from Ms. Christine Frazier to Mr. James Heimbuch was neither an "action" or "act" of the Director of the Ohio Environmental Protection Agency as such terms are defined in Section 3745.04, Ohio Revised Code, and Section 3746-1-01, Ohio Administrative Code, nor did such October 7, 1986 letter constitute an "order" of the Director of the Environmental Protection Agency, as such word is referred to in Chapter 3734, Ohio Revised Code;

2. The parties agree to commence negotiations in an attempt to resolve their differences concerning the meaning of the "transfer facility" exemption as such term is referred to in the Ohio Administrative Code; and

3. Before Appellee [Ohio EPA] takes any enforcement action, pursuant to Chapter 3734, Ohio Revised Code or takes "action" or performs an "act" as those terms are defined by Section 3746-1-01, Ohio Administrative Code, Appellee will notify Appellants [RTS and RIS] of such enforcement action or act of the Director of the Ohio Environmental Protection Agency and further notify Appellants that such action or act is a final action or final order of the Director of the Ohio Environmental Protection Agency or the Ohio Attorney General's office and, further, inform Appellants of their rights to appeal the same to the Environmental Board of Review or the appropriate Ohio Court.

Since the stipulation was entered into, the Ohio EPA, for the last 22 years, has never issued a final order to RTS or RIS in regard to the "transfer facility." However, relying upon the Ohio EPA's failure to issue a final appealable order in regard to the "transfer facility," RTS and RIS have constructed their respective businesses in direct dependence upon the use of the transfer facility in its current location. Furthermore, nowhere in the Director's letter to Ms. Lawson, dated March 4, 2009, does the stipulated language agreed to by the Ohio EPA, in 1986, appear. The proposed permit modification, therefore, is in violation of the prior agreements entered into by the Ohio EPA.

Response to WHP Comment 7:

Per the 1986 EBR stipulation, Ohio EPA and RTS mutually agreed to commence negotiations to resolve differences concerning the meaning of ”transfer facility”. Negotiations to resolve differences on this fundamental issue can thus be initiated by either party according to the ERAC stipulation; Ohio EPA chose to begin the dialog in 2004. Given the mutual commitment to commence negotiations on the meaning of the term “transfer facility”, it is unreasonable for RTS and RIS to rely upon the Ohio EPA’s failure to issue a final appealable order as the foundation for constructing their respective businesses at its current location.

WHP Comment 8: **Additionally, it is RTS and RIS’s position that the Director of the Ohio EPA is without the authority to modify the RIS permit in such a way as to eliminate a legally permissible activity of RTS. Simply put, the Director of the Ohio EPA is utilizing OAC 3745-50-51 to enjoin an activity of a “person” which is not a permitted activity falling under the Director’s direct supervision and control. As I indicated to Michael A. Savage, in my letter dated January 30, 2009 (a copy of which is enclosed herein), RTS is a separate corporation from RIS. OAC 3745-50-10(A)(88) defines “person” as follows:**

… an individual, trust, firm, joint stock company, federal agency, corporation (including a government corporation), partnership, association, the state of Ohio or any state of the United States, municipality, commission, political subdivision of the state, or any interstate body.

Response to WHP Comment 8:

See Ohio EPA Response to WHP Comment 1. The Ohio EPA disagrees with the commenter’s position that the activity of RTS is both legal and permissible. A transfer facility cannot legally be located on the same contiguous piece of property (i.e., on-site) as a designated facility; a permit would be required.

WHP Comment 9: **Therefore, according to Ohio environmental law, RTS and RIS are separate and distinct persons. As indicated above, it is clear, pursuant to Ohio law, that the Director of the Ohio EPA**

cannot regulate two persons under one permit as the Director is attempting to do with the proposed modification ORC 3734.05(F) holds as follows:

The director may issue a single hazardous waste facility installation and operation permit to a person who operates two or more adjoining facilities where hazardous waste is stored, treated, or disposed... "adjoining" means sharing a common boundary...

In other words, one permit may be issued to one person for two adjoining facilities, not one permit to two persons for allegedly two adjoining facilities. Nonetheless, this is what the Director of the Ohio EPA is proposing through the issuance of the modification.

Response to WHP Comment 9:

See Response to WHP Comment 2. The Ohio EPA's position is that there is one facility, two owners and two operators of a single facility.

Owner is defined in OAC rules 3745-50-10 and 3745-50-52 and speaks in terms of ownership of a facility. The term "facility" is defined in OAC rule 3745-50-10 to mean "all contiguous land, and structures, other appurtenances, and improvements on the land, used for …storing…hazardous waste." Thus the owner is the person who holds title to the real property, structures and fixtures. RCC and RIS are owners of this facility. The Ohio EPA has no information that that RTS owns fixtures or appurtenances used for storage of hazardous waste.

The term "operator" is defined in OAC rules 3745-50-10 and 3745-50-52 as the person responsible for the overall operation of the facility. To the extent RTS manages waste manifested to RIS at its transfer operation and is responsible for its day-to-day operation, RTS is conducting storage and is an operator of a portion of the facility. RIS is also an operator and responsible for day-to-day operations of its portion of the facility.

WHP Comment 10:

Furthermore, modifications by the Director are authorized pursuant to OAC 3745-50-51(A) only if there is new information to justify conditions in addition to those already in the permit or the law changes. Neither condition precedent is applicable to this proposed modification. RTS has been utilizing the 2.63 acres in question as a transfer facility since 1981. Since that time, there has not been any new information which would allow the permit modification nor has there been the enactment of any new law. The Director of the Ohio EPA is without the authority to issue the modification.

Response to WHP Comment 10:

ORC Section 3734.05(I)(2) provides the authority for the director to modify an existing permit. Ohio EPA began a dialogue with RIS/RTS in early 2004 to seek an amicable resolution of the transfer facility issue. Although Ohio EPA offered several regulatory options and compliance time frames for addressing the issue, RIS/RTS did not agree to any proposal short of their current arrangement. This decision on RIS/RTS's part constitutes new information that justifies new permit conditions in addition to or different from those in the existing permit as articulated in the director's draft modification.

WHP Comment 11:

It is therefore apparent, from a review of the above, that the Director of the Ohio EPA is without authority to issue the proposed permit modification which seeks to enjoin RTS's use of its leased space for use as a transfer facility. It is likewise apparent that even assuming the Director had such authority (which RTS denies) to issue the permit modification, the Director has no authority through the use of one permit to regulate two facilities owned by two separate persons. Last, but by no means least, the Director is improperly utilizing the modification procedures of OAC 3745-50-51 to obtain equitable injunctive relief without judicial intervention. Such action by the Director is in violation of due process guaranteed to RTS and RIS by the Ohio and United States Constitutions and

constitutes an appropriation of RTS property without just compensation in violation of Article I, Section 19, of the Ohio Constitution. After the Ohio EPA's careful consideration of the above, RTS and RIS request that the Director not proceed with the proposed modification and the Director continue to recognize RTS's right to utilize the subject 2.63 acres as a transfer facility, as has been the case since 1981, or for the past 28 years.

Response to WHP Comment 11:

For reasons specified in Response to WHP Comments 1 thru 10 above, the RTS operation is not a transfer facility for waste designated to RIS.

The Ohio EPA has concluded that the appropriate regulatory standard applicable to transfer facility activities managing hazardous waste manifested to a designated facility where the transfer facility itself is located on property contiguous to that designated facility are the permitting standards and not the transfer facility standards. Accordingly, the Ohio EPA is modifying the RIS permit to include RTS and activities associated with hazardous waste management not falling within the transfer facility exclusion.

End of Response to Comments