

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:	:	
	:	
E.I. DUPONT DE NEMOURS AND	:	
COMPANY,	:	
	:	RCRA Appeal No. _____
Permittee	:	
	:	
HSWA Permit Modification	:	
DuPont Pompton Lakes Works	:	
EPA I.D. No. NJD002173946	:	

PETITION FOR REVIEW

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- Exhibit 1 Final, Permit Modification I, EPA I.D. No. NJD002173946 (Dec. 2012)
- Exhibit 2 Notice of Issuance of Final Hazardous and Solid Waste Amendments of 1984 Permit Modification I to E.I. du Pont de Nemours & Company, Incorporated: Pompton Lakes Works, Pompton Lakes, New Jersey (Dec. 19, 2012)
- Exhibit 3 Final Statement of Basis: RCRA Corrective Action Permit Modification I (Dec. 2012)
- Exhibit 4 Responsiveness Summary: HSWA Permit Modification (Dec. 2012)
- Exhibit 5 HSWA Permit – Pompton Lakes Works (1992)
- Exhibit 6 Draft, Permit Modification I, EPA I.D. No. NJD002173946 (Nov. 2011)
- Exhibit 7 Draft Statement of Basis: RCRA Corrective Action Permit Modification I (Nov. 2011)
- Exhibit 8 Public Notice of Proposal to Issue a Hazardous Waste Permit Modification to Implement Corrective Action Remedies for the Acid Brook Delta Study Area (Nov. 20, 2011)
- Exhibit 9 Letter from Frank Faranca (NJDEP) to David E. Epps (DuPont) (Oct. 22, 2009)
- Exhibit 10 Acid Brook Delta Area Remedial Action Selection Report/Corrective Measures Study (Sept. 2009)
- Exhibit 11 Letter from J. Eric Davis, Jr. (USFWS) to Judith Enck (Region II) (Feb. 9, 2012)
- Exhibit 12 Excerpts from *EPA, Final RCRA Corrective Action Plan*, EPA 520-R-94-004, at 1-3 (May 1994)
- Exhibit 13 Excerpts from *EPA, Guidance on RCRA Corrective Action Decision Documents: Statement of Basis and Response to Comments*, EPA 540-G-91-011, at p. 2-2 (Feb. 1991)
- Exhibit 14 EPA Region II, “Final RCRA/HSWA Permit Modification Public Information Session” (Jan. 16, 2013)

SUMMARY

Pursuant to 40 C.F.R. § 124.19, E.I. du Pont de Nemours and Company (“DuPont”) submits this Petition for Review to contest final RCRA Corrective Action Permit Modification I, issued to DuPont by EPA Region II on December 19, 2012 (the “Permit Modification”).¹ The Permit Modification modifies DuPont’s existing Hazardous and Solid Waste Amendments of 1984 (“HSWA”) Permit, issued to DuPont in 1992, for the company’s Pompton Lakes Works facility in Pompton Lakes, New Jersey.² DuPont contends that the Region lacked the authority to issue the Permit Modification in its final form, and that the Permit Modification is otherwise based on clearly erroneous findings of fact and conclusions of law, and involves significant policy matters that warrant review by the Board. DuPont therefore challenges the Permit Modification in its entirety, and also contests the following specific permit conditions: (1) Conditions III.E.1.d-f and Condition III.E.2, which impermissibly impose new investigation requirements and open-ended remediation requirements on DuPont in a permit modification that is intended solely for final remedy selection and implementation, and which require DuPont to submit work plans according to deadlines that are on their face unreasonable and unattainable; (2) Conditions III.E.1.a-c, which require DuPont to dredge 40 acres of sediment from Pompton Lake (14 acres more in areal extent and nearly double the sediment volume than what was originally proposed and approved by the Region), without any scientific basis or explanation in the administrative record, and notwithstanding the Region’s conclusion that this will not be a final remedy; and (3) Condition III.D.1, which, like Conditions III.E.1.d-f and Condition III.E.2, imposes a compliance deadline that is unreasonable on its face.

¹ A copy of the Final Permit Modification is included as Exhibit 1. Copies of the Region’s Notice of Issuance, Final Statement of Basis and Responsiveness Summary are included as Exhibits 2 through 4, respectively.

² A copy of the 1992 HSWA Permit is included as Exhibit 5.

In accordance with the Region’s Notice of Issuance and the Board’s rules, the filing of this Petition for Review effectively stays the Permit Modification in its entirety. The Notice of Issuance provides that the Permit Modification is effective on February 4, 2013, unless any interested party files a petition for review with this Board.³ This Petition sets out, in detail, challenges to specific conditions in the final Permit Modification added by the Region after the close of the public comment period. Those particular conditions contested by DuPont are stayed by virtue of this appeal.⁴ Additionally, this Petition asserts that these new conditions render the *entire* Permit Modification invalid because such new conditions cannot as a matter of law be included in a corrective measures permit modification, and preclude the implementation of all other conditions in the Permit Modification. As a consequence, all other conditions not specifically identified in this Petition “are not severable from those contested,” such that they must be stayed as well.⁵

INTRODUCTORY STATEMENT

The Region’s stated purpose for issuing the Permit Modification was to formally select and impose a final remedy, in accordance with the terms of DuPont’s HSWA Permit, for an area of the Pompton Lakes Works referred to as the ABD Study Area.⁶ But the Permit Modification, in its final form, does not impose a final remedy for the ABD Study Area, as required under the HSWA Permit. Instead, the Region made substantial changes from the draft to the final permit decision, incorporating in the final Permit Modification requirements for DuPont to perform not only the initially proposed final remedy (which the Region and the New Jersey Department of

³ Ex. 2, Notice of Issuance, at 2.

⁴ See 40 C.F.R. § 124.16(a)(1).

⁵ See *id.* § 124.16(a)(2)(i).

⁶ See Ex. 6, Draft Permit Modification, Condition III.A.1; *see also, e.g.*, Ex. 7, Draft Statement of Basis at 12 (“This permit modification proposes to select dredging as the final remedy for the ABD and excavation as the final remedy for the Uplands soils.”). Copies of the Draft Permit Modification, Draft Statement of Basis and Public Notice of Proposal are included as Exhibits 6 through 8, respectively.

Environmental Protection (“NJDEP”) approved in 2009)⁷, but also to perform further investigations in the ABD Study Area, as well as to implement any additional, undefined remedial actions that the Region may require in the future based on the results of those investigations.

Under the oversight of the Region and NJDEP, DuPont has been conducting investigations within the ABD Study Area since 1990 and is fully committed to restoring the site and surrounding areas as expeditiously as possible. *This commitment remains.* But the Region’s decision to require DuPont to undertake open-ended studies and evaluations concurrently with the implementation of the previously approved remedy, and the Region’s decision to include such open-ended studies and evaluations as enforceable conditions of the Permit Modification, is clear error. Under DuPont’s HSWA Permit, the Region may initiate a permit modification for the purpose of selecting final corrective measures that will meet RCRA cleanup standards *only after* the Region is satisfied that site characterization activities are fully completed and the Region has evaluated all corrective measures options based on the results of such activities, and public input. Likewise, EPA’s corrective action guidance, which EPA has applied at sites across the country for over two decades, sets forth an elaborate remedy selection process based on detailed procedural and substantive requirements, by which the Region issues a permit modification for corrective measures *only after* it is satisfied that all remedial investigations needed to support the selection of an appropriate, implementable remedy have been completed.

Here, by the very terms of the Permit Modification, the Region admits that it is no longer satisfied that the investigative work in the ABD Study Area is done, and acknowledges that the scope of the full remedy to be implemented in the ABD Study Area still remains unknown. And yet the Region decided, unlawfully, to issue the Permit Modification.

⁷ A copy of the 2009 letter approving the final remedy proposed by DuPont is included as Exhibit 9.

The ramifications, both for DuPont and for the community surrounding Pompton Lakes, are significant. First, the Region's departure from the orderly progression set forth in the HSWA Permit and EPA guidance raises significant technical and practical concerns both for DuPont's ability to comply with the Permit Modification and for the ultimate cleanup of the ABD Study Area, as the final Permit Modification now contemplates at least two different phases of remedy implementation, only a portion of which currently has a defined set of requirements and remediation targets. Among other things, sequencing the work in this fashion means that DuPont will need to mobilize to perform the first phase of the remedy – including the dredging of 40 acres of sediment from Pompton Lake – only to have to revisit the effectiveness and appropriateness of the remedy at a later date, after additional studies are completed. It also means that the dredging operation itself will be delayed until new, unspecified requirements relating to shoreline conditions, which will be used as the staging area for the dewatering and shipment of dredged sediment, can be completed. DuPont wants to conduct the remedy right the first time, within a reasonable timeframe that minimizes the impact on the local community, and expects the community would want the same.

Second, as a result of the Region's failure to follow the proper corrective action framework, DuPont is subject to enforceable permit conditions that contemplate additional, undefined remediation in the future, in areas that are yet to be determined by the Region; using cleanup standards that are yet to be defined by the Region; and according to timeframes that are yet to be determined by the Region. Far from selecting and imposing a final remedy, as the permit modification process under the HSWA Permit and EPA guidance is intended to do, the permit conditions included in the final Permit Modification leave the Region with virtually unfettered and unreviewable discretion to require additional corrective measures in the future,

and are so broad and so vague that they make it impossible for DuPont to know what conduct will be required for future compliance. The due process implications are manifest, and are only compounded by the Region's failure to re-publish for an additional round of public comment the revised permit modification containing these expansive new provisions.

Finally, by including future, undefined cleanup obligations as conditions of the Permit Modification, rather than deferring them for later agency action after the newly desired studies are completed, the Region has effectively eliminated any meaningful opportunity not only for DuPont, but also for other interested parties, including members of the Pompton Lakes community, to comment upon any future remedial decisions the Region may make regarding these issues. This violates fundamental principles of administrative law and procedure, and contravenes EPA's own procedures for decisionmaking in 40 C.F.R. Part 124, which require EPA to provide an opportunity for public notice and comment on proposed agency action, to respond to comments and assemble an administrative record, and upon issuing a final decision, to allow for administrative review of its decision.

To be clear, DuPont is prepared to dredge in the ABD Study Area and to perform the additional studies that the Permit Modification now requires, but this work must occur in the right sequence. Here, the Region has selected an impermissible tool – one that is legally available only for final remedy selection and implementation after all remedial investigations are completed to the Region's satisfaction – to require the work to be performed, and the resulting consequences are significant. Consistent with the HSWA Permit and EPA's corrective action guidance, DuPont should implement the final remedy selected by the Region for the ABD Study Area once; should do it completely the first time; and should do it after meaningful input from the community. The Permit Modification accomplishes none of these things. For these reasons,

and those that follow, DuPont respectfully requests that the Board review and correct the Region's errors in issuing the Permit Modification. .

FACTUAL BACKGROUND

The ABD Study Area that is the subject of the Permit Modification consists of the Acid Brook Delta (ABD) portion of Pompton Lakes, as well as the associated Upland Soils Area. DuPont has conducted extensive environmental investigations of the ABD Study Area since 1990, including comprehensive sediment and surface water sampling, mercury methylation studies, and ecological risk assessments. All of these investigations and studies were performed pursuant to and in accordance with the terms of DuPont's 1992 HSWA Permit, as well as a 1988 Administrative Consent Order with NJDEP, and with the oversight and approval of both the Region and NJDEP.⁸

Upon completion of these remedial investigations, and as required by the HSWA Permit, DuPont submitted a final Remedial Investigation Report to the Region and NJDEP in January 2008, and a Remedial Action Selection Report/Corrective Measures Study (RASR/CMS) to EPA and NJDEP in September 2009.⁹ In the RASR/CMS, DuPont proposed dredging of approximately 26 acres of sediment from the ABD Study Area and excavation of approximately 7,800 cubic yards of soils as the final remedy to address the contamination in the ABD Study Area.¹⁰ The Region and NJDEP approved this final remedy in October 2009.¹¹

At EPA's direction, DuPont submitted to the Region in April 2011 an application for a proposed permit modification in order to administratively incorporate the approved final remedy into the HSWA Permit. The Region then issued a draft permit modification and accompanying

⁸ See Ex.7, Draft Statement of Basis, at 3.

⁹ A copy of the RASR/CMS is included as Exhibit 10.

¹⁰ See generally Ex. 10, RASR/CMS.

¹¹ See Ex. 9, 2009 Approval Letter.

statement of basis in November 2011, containing the approved final remedy as the “selected corrective measures” for the ABD Study Area.¹² Nowhere in the draft permit modification, nor in the accompanying statement of basis, was there any mention of the need for additional investigation, evaluation or site characterization work to implement the selected remedy that was approved two years earlier. In fact, the Region made clear in the statement of basis that it was proposing “to select dredging as the *final remedy* for the ABD and excavation as the *final remedy* for the Uplands soils.”¹³

The Region solicited public review and comment on the proposed final remedy contained in the draft permit modification from November 20, 2011 to January 13, 2012, and continued to consult with various agencies, including NJDEP and the United States Fish and Wildlife Service (“USFWS”), thereafter. By letter dated February 9, 2012, the USFWS provided written comments to the Region on certain state-issued permits that DuPont needed to obtain from NJDEP to perform the selected remedial action.¹⁴ In that letter, the USFWS expressed concerns about areas of the ABD Study Area that would not be addressed by the proposed final remedy set forth in the draft permit modification, and about the approach and conclusions of the ecological risk assessment that was used to support the selected remedy.¹⁵ In short, while the USFWS supported the approved final remedy, the USFWS believed that additional studies and investigations were warranted in the ABD Study Area, to determine if sediment within the remainder of the Pompton Lake presented ecological risks that might require additional remediation (and if so, what corrective measures might be necessary to address those risks).¹⁶

¹² See Ex. 6, Draft Permit Modification, Module III.A.1.

¹³ See Ex. 7, Draft Statement of Basis, at 12 (emphasis added).

¹⁴ A copy of the USFWS’s February 9, 2012 letter is included as Exhibit 11.

¹⁵ See Ex. 11, USFWS Letter.

¹⁶ See *id.* at 9-10.

Several months after the Region's receipt of these comments from the USFWS, the Region summoned DuPont to a meeting where the Region expressed its desire to address the USFWS comments with additional ecological studies. After considering the information presented by the Region, DuPont informed the Region that DuPont would agree to implement the final remedy approved by the Region and NJDEP in the RASR/CMS as an interim remedial measure, and to undertake certain additional studies, the scope of which would need to be worked out with the Region, NJDEP and USFWS, in order to achieve the parties' common goals for the project. DuPont proposed to complete this effort pursuant to its HSWA Permit, without the need for a Permit Modification.

The Region did not respond to DuPont's proposal. Instead, on December 19, 2012, the Region issued the final Permit Modification, adding new conditions that were inconsistent with DuPont's proposed approach, and including a new, two-phased approach to the remediation of the ABD Study Area: the first phase to consist of the previously approved final remedy (although larger in scope than that originally proposed and previously approved, and with new, undefined remedial action objectives for certain portions of the Upland Soils Area), and a second phase, with an unknown scope and undefined cleanup targets, to be determined following additional site characterization and assessment, the performance of which is now included as enforceable conditions of the Permit Modification.¹⁷

As a result, the final Permit Modification contains a number of substantial new requirements that were not included in the draft permit modification, including:

- Expansion of the sediment removal area in the ABD to approximately 40 acres, thereby requiring, by DuPont's calculation, the removal of an additional 57,200 cubic yards of sediment (an 83% increase above the 68,800 cubic yards DuPont was required to remove by the draft Permit Modification) and the installation of an additional 23,800 cubic yards of backfill material;

¹⁷ See Ex. 1, Final Permit Modification, Conditions III.E.1 & 2; Ex. 4, Responsiveness Summary, at 5, 7, 15.

- The development and implementation of a comprehensive Sediment Sampling Plan outside the expanded removal area and downriver from the ABD, the data from which “will be used to assess the need for additional remediation in downstream areas”;¹⁸
- The development and implementation of an updated Ecological Risk Assessment for the entire lake system, which “will be used to determine the need for any further remedial action beyond the actions prescribed in this permit”;¹⁹
- The development and implementation of a Lake System Sampling and Monitoring Program, including an establishment of baseline conditions and a minimum of five years of post-remediation monitoring, which will “be used in conjunction with the [Ecological Risk Assessment] to determine the need for any additional remedial actions in the Pompton Lake/Ramapo River system”;²⁰ and
- The development of an updated Remediation and Restoration Plan for the wetlands and wetlands transition zones in the Upland Soil Areas, and the remediation and restoration of those areas according to the cleanup criteria to be specified in the yet-to-be-developed and approved Plan.²¹

Nowhere in the Statement of Basis or Responsiveness Summary accompanying the final Permit Modification did the Region articulate a rationale for rejecting the final remedy for the ABD Study Area that was previously approved by the Region in 2009 and proposed by the Region in the November 2011 draft permit modification. Nor did the Region explain its drastic departure from the corrective action procedures set forth in both the HSWA Permit and EPA’s corrective action guidance. However, it is clear by the conditions of the final Permit Modification that, based on the comments the Region received during and after the public comment period, the Region now believes that additional evaluation and study of the ABD Study Area is needed before a final remedy can be selected.

¹⁸ Ex. 1, Final Permit Modification, Condition III.E.1.d; Ex. 4, Responsiveness Summary, at 13.

¹⁹ Ex. 1, Final Permit Modification, Condition III.E.1.f; Ex. 4, Responsiveness Summary, at 20.

²⁰ Ex. 1, Final Permit Modification, Condition III.E.1.e; Ex. 4, Responsiveness Summary, at 20.

²¹ Ex. 1, Permit Modification, Condition III.E.2; *see also* Ex. 3, Statement of Basis, at 3 (describing additional investigation and remediation requirements).

THRESHOLD PROCEDURAL REQUIREMENTS

DuPont satisfies the threshold requirements for filing a Petition for Review under 40 C.F.R. Part 124, as follows:

1. Although DuPont submitted no written comments during the public comment period on the draft permit modification decision (since DuPont had no objections to the conditions of such permit modification), DuPont has standing to petition for review of the Region's final permit decision because DuPont seeks review "only to the extent of the changes from the draft to the final permit decision."²²
2. The issues raised in this Petition relating to the Region's decision to increase the volume of sediment to be dredged from the ABD were raised during the public comment period, and therefore preserved for review.²³
3. All other issues raised in this Petition were not reasonably foreseeable during the public comment period, and therefore are eligible for review.²⁴

ARGUMENT

I. The Region Committed Clear Error by Requiring Additional Site Investigations and Further Undefined Remedial Actions in the Permit Modification.

In addition to requiring DuPont to perform what the Region had originally proposed as the final remedy for the ABD Study Area (the same remedy that the Region and NJDEP had previously approved in 2009), the final Permit Modification also requires DuPont to perform additional investigations and further open-ended remediation in the ABD Study Area (Conditions III.E.1.d-f), and to develop and implement new remedial options for the Upland Soils Area. (Condition III.E.2). The Region's decision to include these conditions as

²² 40 C.F.R. § 124.19(a).

²³ See, e.g., Ex. 4, Responsiveness Summary at 4.

²⁴ See 40 C.F.R. §§ 124.13 and 124.19(a); see also Argument Section I, *infra*.

enforceable components of the Permit Modification constitutes clear error, and involves significant policy matters that warrant the Board's review.

A. The Permit Modification Conflicts with DuPont's HSWA Permit and EPA's National Corrective Action Guidance.

DuPont's HSWA Permit, together with EPA's corrective action guidance, specify in great detail the process and sequence by which RCRA corrective action is to be carried out, and contemplate the issuance of a permit modification for corrective measures, such as the Permit Modification issued by the Region here, to be the final step in this process – that is, a step that is to occur only *after* EPA is satisfied that all site investigations and studies are complete, and all potential remedies are evaluated. On its face, the final Permit Modification represents a substantial and unlawful departure from this process, and thus warrants this Board's review.

1. The Permit Modification Impermissibly Deviates From the Corrective Action Process Set Forth in the HSWA Permit.

The corrective action process set out in DuPont's HSWA Permit consists of three basic phases:

- (1) Site investigation, which itself consists of two parts: the initial site assessment, referred to as the RCRA Facility Assessment, or "RFA," and subsequent site characterization, referred to as the RCRA Facility Investigation, or "RFI";
- (2) Evaluation of possible remedial alternatives, referred to as the Corrective Measures Study, or "CMS"; and finally,
- (3) Selection and implementation of the final remedy, which is incorporated into the HSWA Permit through a corrective measures permit modification.²⁵

The HSWA Permit explains in detail the role that each of these phases has in the corrective action process and their interrelationship, and makes clear that remedy selection and implementation follows all necessary remedial investigation. Thus, as the HSWA Permit

²⁵ See Ex. 5, HSWA Permit, Module III.A.2 , III-1-3.

explains, once the RFA is complete and the need for further investigative work is identified, the purpose of the RFI is to “determine the nature, extent, direction, and rate of migration of hazardous wastes,” as may be necessary to “*allow proper assessment of corrective measure alternatives.*”²⁶ And consistent with this stated purpose, the HSWA Permit allows the Region to require additional site characterization whenever it determines that further information is necessary to allow for proper assessment of potential remedies.²⁷

The HSWA Permit further indicates that, once all required site characterization is complete, what follows is the corrective measures phase, which the Permit describes as the “culmination of the Corrective Action Program.”²⁸ This phase starts with the preparation of the CMS, which must “address alternative corrective measures strategies that are technologically feasible and reliable and which effectively mitigate and minimize damage to, and provides [sic] adequate protection of, human health and the environment.”²⁹ If necessary, the Region can require DuPont to supplement the CMS, and “to evaluate additional corrective measures or particular elements of one or more corrective measures.”³⁰

Finally, once the CMS is complete, the HSWA Permit requires the Region to “select the corrective measure(s) from the corrective measures evaluated in the CMS,” and “then initiate a permit modification for the selected corrective measure(s).”³¹ The HSWA Permit further explains:

Permit modification for the approved corrective measure(s) will initiate the *final stage* of corrective measures, Corrective Measures Implementation (“CMI”). The CMI will address the *final* design,

²⁶ *Id.*, Module III.A.2, III-2 (emphasis added).

²⁷ *Id.*, Module III.E.1.c, III-26-27.

²⁸ *Id.*, Module III.A.2, III-2.

²⁹ *Id.*

³⁰ *Id.*, Module III.E.7.d, III-34.

³¹ *Id.*, Module III.A.2, III-3.

construction, operation, maintenance, and monitoring of the corrective measure or measures selected.”³²

Underscoring the finality of the permit modification, Condition III.E.9 of the HSWA Permit, titled “Permit Modification for Corrective Measure(s),” requires that the permit modification include a full description of the *entire* remedy selected by the Region, including, among other things: (1) a description of “all technical features of the corrective measure(s)”;

(2) all “media cleanup standards for hazardous constituents, selected by the [Region], that the corrective measure(s) must achieve to be protective of human health and the environment”; and

(3) all “requirements for achieving compliance with these cleanup standards.”³³ Thus, the permit modification must specify, based on the information DuPont submits in the RFI and CMS phases, all of the corrective measures the Region will require – in other words, the final remedy.³⁴

The final Permit Modification issued by the Region does not adhere to this phased corrective action process set out in the HSWA permit. Instead, it erases the HSWA Permit’s distinction between the investigation and corrective measures phases of corrective action. In addition to requiring DuPont to dredge 40 acres of sediment from Pompton Lake, the Permit Modification requires DuPont to conduct additional sediment sampling in the lake, to conduct baseline sampling and long-term monitoring of lake conditions, and to develop a new ecological risk assessment for the entire lake system, all to determine what additional corrective measures

³² *Id.*, Module III.A.2, III-3 (emphasis added).

³³ *Id.*, Module III.E.9.a.i.-iii, III-37-38.

³⁴ Notably, the Region advanced this very interpretation of the HSWA Permit’s permit modification provisions in the Responsiveness Summary that accompanied the Region’s issuance of the HSWA Permit in 1992. There, in response to a comment from DuPont that Condition III.E.9 should be removed, the Region described the “permit modification process required in the HSWA permit” as one for “*selection of the final remedial alternative*,” and assured DuPont that EPA would “coordinate with NJDEPE [now NJDEP] to ensure selection of *final corrective remedy alternatives* without unnecessary delays.” See Ex. 5, HSWA Permit Responsiveness Summary, at 19-20.

should be required in the ABD Study Area.³⁵ But the HSWA Permit clearly provides that all activities of this sort are to be conducted as part of the RFI phase, and do not have any place in a permit modification that is intended only to accomplish the implementation of the final remedy that the Region selects, based on all of the information gathered during the prior phases.

Additionally, the Permit Modification requires DuPont to design and submit to the Region an updated plan for remediating and restoring portions of the Upland Soils Area, and once approved by the Region, to implement that plan to the Region's satisfaction.³⁶ But again, these types of requirements – the development of plans for potential corrective measures – are supposed to occur as part of the CMS, not a corrective measures permit modification.

Further, by their very nature, these types of obligations prevent compliance with the HSWA Permit's substantive requirements for a permit modification for corrective measures, because the information that must be included— a description of the remedy's technical features, the cleanup standards that must be achieved, and the standards that must be met to demonstrate compliance – is currently unknown, and will not be known until the additional investigations that the final Permit Modification requires are completed, and further potential corrective measures are evaluated by the Region. In all, then, the Region's decision to add these conditions in the final Permit Modification turns what is required to be a final remedial decision into another intermediate step in the corrective action process. The HSWA Permit does not allow such an action.

³⁵ See, e.g., Ex. 1, Permit Modification, Conditions III.E.d.1 & III.E.d.4 (stating that the Region will determine the need for additional dredging beyond the currently defined sediment removal area based on the results of the Sediment Sampling Plan to be submitted by DuPont and approved by the Region), Condition III.E.f.3 (stating that the need for any subsequent remedial activity in the lake system shall be determined based on the findings of an Ecological Risk Assessment Report to be submitted by DuPont and approved by the Region), & Condition III.E.b.2 (requiring DuPont to satisfy remedial requirements set forth in an updated Remediation and Restoration Plan to be submitted by DuPont and approved by the Region).

³⁶ See *id.*, Condition.E.2.

2. The Permit Modification Impermissibly Deviates From EPA's National Corrective Action Guidance.

The Region's failure to follow the corrective action procedures set forth in DuPont's HSWA Permit also puts the Region's decision at odds with EPA's national corrective action guidance, including in particular EPA's 1990 Subpart S Proposal (upon which the HSWA Permit was modeled), which directs the Region to institute a permit modification only after all site investigations are complete and all potential remedies are evaluated.³⁷

The Board has described the Subpart S Proposal as a "document which the Agency [has] historically employed as a basic blueprint for carrying out its corrective action authority,"³⁸ and has invalidated permitting decisions that deviate from it.³⁹ And like the HSWA Permit, the Subpart S Proposal sets forth a detailed procedural and substantive framework for conducting corrective action, starting with remedial investigations to characterize site contamination;⁴⁰ followed by the preparation of a CMS to identify and evaluate potential remedies;⁴¹ and ending with the Agency's selection of a final remedy – and the initiation of a permit modification to incorporate that remedy – as the *final* step in the process, following the completion of all necessary site investigations and studies.⁴²

Correspondingly, when describing the permit modification step, EPA explains in the Subpart S Proposal that the permit modification is "for the purpose of specifying the selected corrective measures and imposing a schedule of compliance for implementing the remedy," and "provides an opportunity for the public to comment on activities (*e.g.*, the remedial

³⁷ See NOTICE OF PROPOSED RULEMAKING, 55 Fed. Reg. 30798, 30834-35 (July 27, 1990) (the "Subpart S Proposal").

³⁸ *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 702 (E.A.B. 2000).

³⁹ See *In re Env't'l Waste Control, Inc.*, 5 E.A.D. 264, 287-88 (E.A.B. 1994); *In re Sandoz Pharm. Corp.*, 4 E.A.D. 75, 82-83 (E.A.B. 1992).

⁴⁰ 55 Fed. Reg. at 30810 (proposed 40 C.F.R. §§ 264.510-264.513).

⁴¹ *Id.* at 30821, 30876 (proposed 40 C.F.R. §§ 264.522-264.524).

⁴² *Id.* at 30823, 30834 (proposed 40 C.F.R. §§ 264.525-264.526).

investigations and the CMS) that have led up to the identification and selection of the remedy.”⁴³

Moreover, the Subpart S Proposal also requires the permit modification to contain the same substantive elements as those required by the HSWA Permit, all of which contemplate that a final remedy is being selected for implementation, not just the first phase of an as-of-yet undefined corrective action plan.⁴⁴

EPA’s subsequent guidance on the corrective action process is in accord. In EPA’s 1996 Advance Notice of Proposed Rulemaking, which updated many aspects of the Subpart S Proposal and which EPA indicated in 1999 should be considered the “primary corrective action implementation guidance,”⁴⁵ EPA preserved the general process and sequence for corrective action implementation set forth in the Subpart S Proposal, and specifically clarified that the remedial investigation phase should be focused on the gathering of “information needed to support an appropriate, implementable remedy.”⁴⁶ In EPA’s 1994 Final RCRA Corrective Action Plan, EPA describes the same order and sequence for corrective action, with the selection and implementation of a final remedy occurring only after the RFI is completed.⁴⁷

And finally, in EPA’s 1991 *Guidance on RCRA Corrective Action Decision Documents: Statement of Basis and Response to Comments* (the “1991 Guidance”), EPA makes clear that the permit modification is part of the final step in the corrective action process, as depicted in the following replicated version of Figure 1-1 :⁴⁸

⁴³ 55 Fed. Reg. at 30834.

⁴⁴ See *id.* at 30834-35, 30879 (proposed 40 C.F.R. § 264.526(b)).

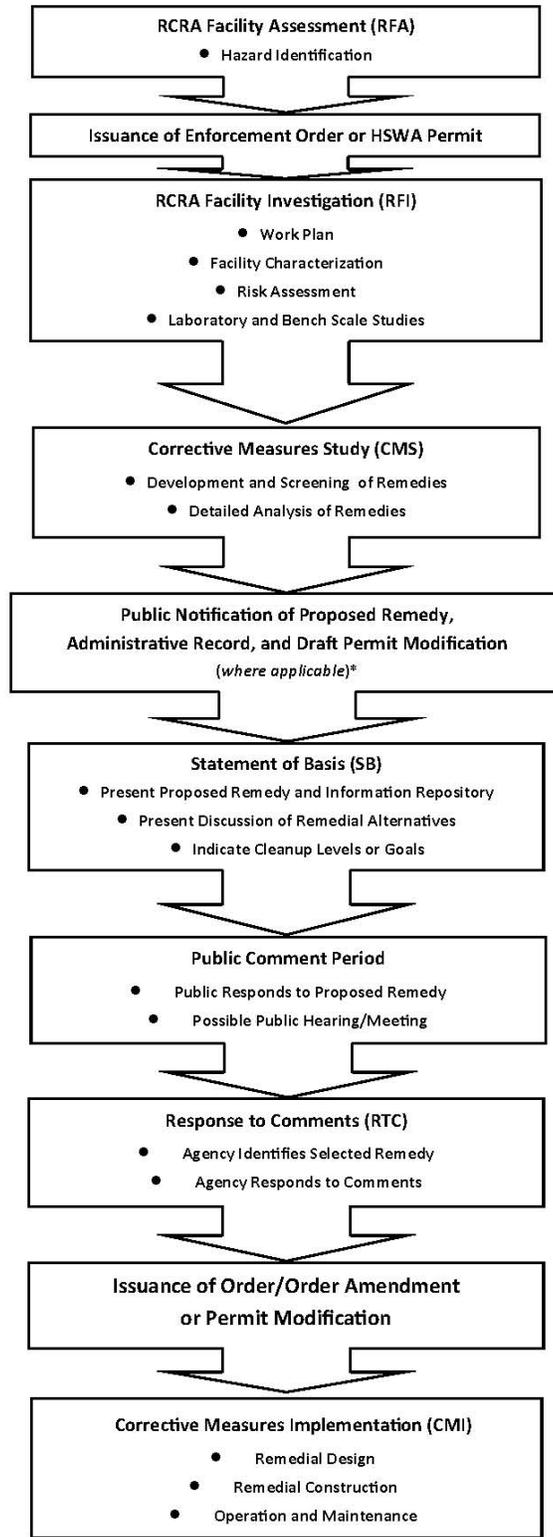
⁴⁵ See PARTIAL WITHDRAWAL OF RULEMAKING PROPOSAL, 64 Fed. Reg. 54604, 54606 (Oct. 7, 1999) (partial withdrawal of Subpart S Proposal).

⁴⁶ See ADVANCED NOTICE OF PROPOSED RULEMAKING, 61 Fed. Reg. 19432, 19442, 19447 (May 1, 1996).

⁴⁷ See EPA, *Final RCRA Corrective Action Plan*, EPA 520-R-94-004, at 1-4 (May 1994). Excerpts of this document are attached as Exhibit 12.

⁴⁸ See EPA, *Guidance on RCRA Corrective Action Decision Documents: Statement of Basis and Response to Comments* (“1991 Guidance”), EPA 540-G-91-011, at Fig. 1-1, p. 1-3 (Feb. 1991). Excerpts of this document, including the original of the flowchart replicated in the text, are attached as Exhibit 13.

RCRA CORRECTIVE ACTION PROCESS



*The administrative record should be accessible to the public during the entire corrective action process.

Expounding upon this flowchart, the 1991 Guidance specifically describes the purpose of the permit modification and its role in the overall corrective action scheme, explaining, among other things, that:

- “[t]he permit modification ... provides the framework for the transition into the next phase of the remedial process, CMI [Corrective Measures Implementation],” which “includes designing, constructing, operating, maintaining and monitoring the performance of the remedy(ies) selected to protect human health and the environment”; and
- the Response-to-Comments document to be issued with the final permit modification “should provide the final declaration that the selected remedy is protective of human health and the environment.”⁴⁹

A permit modification that requires additional site assessment falls far outside this scheme. A permittee cannot design and construct a remedy for a site, as corrective measures implementation requires, if the site is not yet fully characterized, and the remedy not yet fully defined. And a Regional Office cannot issue a final declaration that the selected remedy is protective of human health and the environment, where the Region concedes that additional investigation is required to make this determination, and that the full scope of the remedy remains undefined.

Together, these guidance documents direct the Region to institute a permit modification for corrective measures only after the Region has concluded that all necessary site investigations are complete, and the Region has selected a final remedy for implementation. Yet as fully articulated in the previous section, the final Permit Modification deviates from the basic structure of EPA’s corrective action program as set forth in these guidance documents, transforming what should be the final step in the corrective action process into an intermediate, investigatory step.

⁴⁹ Ex. 13, at pp. 1-8, 4-5.

On its face, then, the Region's final decision constitutes clear error, and should be reviewed by this Board.

B. The Permit Modification Introduces Significant Technical and Practical Challenges for Permit Compliance and for Remedy Implementation, and Raises Serious Due Process and Public Participation Concerns.

The Region's failure to follow the corrective action process prescribed in the HSWA Permit and in EPA's national corrective action guidance is not merely a procedural deficiency. To the contrary, unless the Permit Modification is set aside by this Board, the Region's action will have significant substantive impacts on DuPont's ability both to comply with the terms of the Permit Modification, and to successfully remediate the ABD Study Area. It also raises serious due process and administrative procedure concerns that warrant this Board's review.

1. The Permit Modification will hinder DuPont's ability to successfully remediate the ABD Study Area and to otherwise comply with the permit requirements.

One reason for separating the investigatory and remedial phases of corrective action is to ensure that these two sets of interrelated activities do not interfere or conflict with one another. The information gathered from the studies and investigations conducted during the remedial investigation phase serves as the predicate for identifying potential corrective measures in the CMS, and for defining an appropriate final remedy based on the remedy evaluation criteria set forth in the HSWA Permit and relevant guidance.

The new conditions included in the final Permit Modification present this precise problem by requiring DuPont to immediately begin dredging 40 acres of sediment from Pompton Lake, and at the same time, to develop additional information on which to base a decision regarding additional future remedial actions in both Pompton Lake and in certain portions of the Upland Soil Areas. Combining the investigation and remedial phases in this fashion and requiring that they proceed concurrently is inconsistent with the corrective action process and

presents significant implementation and compliance issues for DuPont in a number of areas, including, by way of example, the following:

- a. *Implementation of a large-scale remedy that the Region may later find was inappropriate or inferior to other remedial options*

Perhaps most problematic from an implementation perspective, the Permit Modification prevents DuPont from properly designing, constructing and implementing a full-scale remedy for the ABD Study Area, because the full scope of the remedy that the Region ultimately may require currently remains unknown. As a result, instead of designing a set of final corrective measures that the Region has concluded will be fully protective of human health and the environment, DuPont is forced to develop and implement what is essentially a partial work plan, which will be subject to change or modification at any time, as additional information about site conditions is gathered.

Proceeding in this way presents particular challenges with respect to the dredging of Pompton Lake, since it makes no technical sense to proceed with a large-scale, 40-acre sediment removal project (as it is now defined by the Region), when decisions about the nature, extent, sequence and timing of the work could change dramatically over the next few years. Indeed, the additional investigations required in the final Permit Modification may cause the Region to conclude, during or after the dredging operation, that dredging is not, in fact, the most appropriate remedy for the ABD Study Area and the rest of Pompton Lake; that DuPont will need to remobilize to conduct a second dredging operation; or at best, that the dredging operation should have been performed differently. This is not the right outcome for DuPont, for the Region or for the Pompton Lakes community.

b. Inability to dredge Pompton Lake and investigate the Upland Soils Area at the same time

The added investigations required as part of the final Permit Modification also present substantial challenges for DuPont to implement even the “first phase” dredging operation in the ABD Study Area, as the Permit Modification contemplates remedy implementation and further site characterization in the same place and at the same time. Specifically, the Region requires DuPont to use the shoreline in the Upland Soils Area as the staging area for the 40 acres of sediment to be removed from Pompton Lake during the initial phase of dredging.⁵⁰ Yet at the same time, the Region also requires DuPont to study the Upland Soils Area to determine what if any additional corrective measures need to be implemented in order to adequately address the ecological exposure pathway.⁵¹ DuPont cannot comply with both conditions at the same time.⁵²

There are also significant timing implications resulting from the Region’s sequencing of this work. Before any dredging can commence in Pompton Lake, the Upland Soils Area needs to be remediated and backfilled with clean fill, and a staging area set up for the dewatering and transportation of dredged sediment. The remediation standards for the wetlands and wetlands transition zones in the Upland Soils Area, however, are currently unknown, and will remain unknown until the additional investigation required in these areas is completed.⁵³ This will cause delays not only in the dredging of Pompton Lake, but also in the ultimate restoration of the Upland Soils Area, which cannot take place until the dredging effort is complete. Again, this is not the right outcome for DuPont, for the Region or for the Pompton Lakes community.

⁵⁰ Ex. 3, Final Statement of Basis, at 16.

⁵¹ Ex. 1, Final Permit Modification, Condition III.E.2.a.(2).

⁵² And there are other implementation issues as well. For example, the expanded 40-acre dredging area includes the only public access point to Pompton Lake, making it difficult for DuPont to get resources in and out of the lake as may be needed to conduct the additional investigations that are required under the Permit Modification. In addition, sampling in areas where dredging operations are simultaneously being conducted could lead to unrepresentative results, affecting the quality and reliability of the monitoring data.

⁵³ Ex. 1, Final Permit Modification, Condition III.E.2.a.(2).

c. *Additional permitting requirements and attendant delays*

The inability to design and implement a full-scale remedy for the ABD Study Area also complicates what is already a complex and multi-faceted permitting process that DuPont must navigate before it can initiate any corrective measures in the ABD Study Area. In this regard, DuPont must obtain no fewer than 11 state or local permits to proceed with dredging Pompton Lake.⁵⁴ Even assuming that DuPont could successfully obtain all of these permits without a fully defined remedial plan, all of these permits have limited permit terms,⁵⁵ and most if not all will require new or modified applications for any change in the remedy as is currently defined.⁵⁶ As a result, instead of accelerating the final cleanup of the ABD Study Area, the Region's approach only invites further delay, and multiple rounds of permitting. Again, this is not the right outcome for DuPont, for the Region or for the Pompton Lakes community.

d. *Impediments to financial assurance compliance*

Finally, in addition to the foregoing implementation issues, it is unclear how DuPont can comply with its financial assurance obligations under the HSWA Permit, where the remedial measures that DuPont will need to implement in the ABD Study Area remain open-ended and undefined. In this regard, the HSWA permit specifies, in pertinent part, that:

Within thirty (30) calendar days after this Permit has been modified, the Permittee shall demonstrate in writing to the

⁵⁴ The Region itself acknowledges that DuPont will need eleven different permits to conduct the work required by the Permit Modification. Ex. 14, EPA, "Final RCRA/HSWA Permit Modification Public Information Session," at 12 (Jan. 16, 2013). Among others, such required permits include: (1) a permit issued by NJDEP under the Freshwater Wetlands Protection Act regulations, *see* N.J. Admin. Code tit. 7, ch. 7A; (2) a permit issued by NJDEP under the Flood Hazard Area Control Act regulations, *see* N.J. Admin Code tit. 7, ch. 13; (3) a Stormwater Management Permit issued by NJDEP, *see* N.J. Admin. Code tit. 7, ch. 8; (4) a permit issued by the N.J. Department of Agriculture under the Soil Erosion and Sediment Control Act rules, *see* N.J. Admin. Code tit. 2, ch. 90; and (5) a permit issued by the Borough of Pompton Lakes, *see* Pompton Lakes Borough Code ch. 159. *See* Ex. 14, Public Information Session, at 12.

⁵⁵ *See, e.g.*, N.J. Admin. Code § 7:13-9.4.

⁵⁶ *See, e.g., id.* § 7:7A-14.3(d).

Regional Administrator [the] financial assurance for completing the approved corrective measure(s).⁵⁷

The Region offers no guidance on how DuPont can demonstrate financial assurance for the remedial activities contemplated by the Permit Modification. Establishing the cost of corrective measures would be a necessary predicate for DuPont to demonstrate financial assurance to the Region. But DuPont cannot estimate the cost of the final remedy for the ABD Study Area when the Region has stated that it will not select a final remedy until additional site investigations are completed. As a consequence, the final Permit Modification effectively prevents DuPont from complying with a provision of the HSWA Permit that was not the subject of this modification proceeding.⁵⁸

* * * * *

These real world difficulties underscore precisely why the corrective action process is structured the way it is in both the HSWA Permit and in EPA guidance, with the agency initiating a permit modification only after all necessary investigations are performed and a final remedy based on the results of those investigations is selected. *Indeed, all of these problems with remedy implementation and permit compliance could have been avoided, and the additional work that the Region now desires could still get done, simply if the Region followed the correct procedures;* then, there would be no chance that investigatory and remedial activities would conflict with one another, and the Region would be able to select a final remedy that the Region could be assured would, in the first instance, be fully protective of human health and the environment. The Board should therefore grant review, and either vacate the permit conditions

⁵⁷ Ex. 5, HSWA Permit, Module III.E.9.b., III-38.

⁵⁸ Additionally, the Statement of Basis accompanying the final Permit Modification makes it even more difficult for DuPont to ascertain its precise financial assurance obligations. Notwithstanding the provisions of the HSWA Permit, the Statement of Basis indicates that the final Permit Modification “incorporates provisions for financial assurance for corrective action, pursuant to 40 C.F.R. 264.101 and Section 3004 of RCRA,” and requires DuPont to submit an initial cost estimate for necessary corrective action within 90 days of the effective date of the Permit Modification. Ex. 3, Final Statement of Basis, at 18.

that were added by the Region after the public comment period, or remand the Permit Modification to the Region with instructions to resolve these deficiencies.

2. The Permit Modification eliminates important procedural steps in the Region's decisionmaking process.

In addition to the implementation concerns addressed above, the final Permit Modification also raises serious due process and administrative procedure concerns that the Board should review and address in a remand to the Region. First, as described above, the Permit Modification contains open-ended remediation requirements that purport to require DuPont to conduct any additional corrective measures that the Region later determines may be necessary in the ABD Study Area, according to whatever cleanup standards and timetables the Region may specify in the future.⁵⁹ These provisions are impermissibly vague and overbroad, as they leave the Region with virtually unfettered discretion to impose additional corrective action obligations on DuPont, and on the other hand, leave DuPont with no knowledge of what may or will be required in the future, and no ability to measure compliance. Under these circumstances, the Region's action clearly violates DuPont's due process rights, and thus warrants the Board's intervention.⁶⁰

Second, by including future, undefined cleanup obligations as conditions of the Permit Modification, without any additional permitting procedure contemplated before such additional actions are required, the Region has eliminated any meaningful opportunity not only for DuPont, but also members of the local community, to comment or provide input on the Region's future

⁵⁹ See, e.g., Ex. 1, Permit Modification, Conditions III.E.d.1 & III.E.d.4 (stating that the Region will determine the need for additional dredging beyond the currently defined sediment removal area based on the results of the Sediment Sampling Plan to be submitted by DuPont and approved by the Region), Condition III.E.f.3 (stating that the need for any subsequent remedial activity in the lake system shall be determined based on the findings of an Ecological Risk Assessment Report to be submitted by DuPont and approved by the Region), & Condition III.E.b.2 (requiring DuPont to satisfy remedial requirements set forth in an updated Remediation and Restoration Plan to be submitted by DuPont and approved by the Region).

⁶⁰ Cf. *American Iron & Steel Institute v. EPA*, 115 F.3d 979, 994 (D.C. Cir. 1997) (explaining that a "standard with which compliance cannot be assessed ... is not a standard at all for purposes of due process").

cleanup decisions in the ABD Study Area. The Region's action in this regard disturbs fundamental principles of administrative law and procedure, by effectively jettisoning what should be a separate agency action, subject to EPA's full decisionmaking processes (including the right to comment on and seek review of any final actions that the Region takes).⁶¹ As such, the Region's action involves significant policy matters that are not limited to the specifics of this particular Permit Modification, and which warrant the Board's review.

II. The Region Abused its Discretion by Failing to Reopen the Public Comment Period to Solicit Comments on Its Decision to Require Additional Work Beyond the Originally Proposed Final Remedy.

Even if the Board were to conclude, notwithstanding the foregoing, that the Region's decision to include the additional investigation and future remediation requirements in the final Permit Modification was not erroneous, the Region nonetheless acted contrary to law and abused its discretion by failing to reopen the public comment period to solicit comments on those requirements prior to issuing its final permit decision. Under EPA regulations, the Region must provide public notice and solicit comments on any draft RCRA permit or permit modification.⁶² Further, EPA may take a final action that differs from the original proposal only if the final action was a "logical outgrowth" of the original proposal.⁶³ Final agency action is a "logical outgrowth" of a proposal "only if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."⁶⁴ Stated another way, a final agency action is not a logical

⁶¹ See 40 C.F.R. §§ 124.10 (providing for public notice and comment), 124.17 (requiring EPA to respond to comments), 124.18 (requiring final permit decisions to be based on the administrative record) & 124.19 (providing for administrative review of final permit decisions).

⁶² See 40 C.F.R. § 124.10; *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1384-85 (4th Cir. 1990); *NRDC v. EPA* 279 F.3d 1180, 11866 (9th Cir. 2002).

⁶³ See *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003); see also 40 C.F.R. § 124.14(b) (providing for reopening of the public comment period where new information or comments submitted during the initial comment period raise substantial new questions concerning a permit).

⁶⁴ *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

outgrowth of the initial proposal, where a party would have submitted additional or different comments had they had notice of the changes.⁶⁵

Applying the “logical outgrowth” test, the Board has remanded final permit decisions to EPA where, among other things, the changes contained in the final permit depart from established agency policy,⁶⁶ and where the final permit contains new conditions imposing a significant burden on the permittee.⁶⁷ Both circumstances are present here.

In its November 2011 proposal to modify the HSWA Permit, the Region proposed to select dredging and excavation – the same remedy proposed by DuPont in the 2009 RASR/CMS, and the same remedy approved by NJDEP and the Region in October 2009 – as the “final remedy” for the ABD Study Area.⁶⁸ Correspondingly, the draft permit modification did not contain *any* provisions requiring additional site investigation or any other future remedial actions in the ABD Study Area. Instead, it identified only the selected corrective measures to be implemented, and the technical requirements necessary to achieve compliance. This is why DuPont elected not to submit comments on the draft permit modification.

Nor did any of the documents accompanying the Region’s proposed decision even hint, much less state, that the Region was considering such additional work, or that the proposed “final remedy,” which had already been approved by the Region as a final remedy, was in fact anything short of final. Indeed, it was apparently only after receiving the USFWS’s February 9, 2012 comments on DuPont’s applications for certain state permits, submitted after and outside of the specified public comment period on the draft permit modification, that the Region began to

⁶⁵ *Environmental Integrity Project*, 425 F.3d at 996.

⁶⁶ *See, e.g., In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 761 (E.A.B. 2008).

⁶⁷ *See, e.g., In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (E.A.B. 1993); *In re GSX Servs.*, 4 E.A.D. 451, 467 (E.A.B. 1992).

⁶⁸ *See, e.g., Ex. 7, Draft Statement of Basis*, at 2 (describing dredging the ABD and excavation of upland soil “as the *final remedy* for the ABD”) (emphasis added), & 12 (proposing “to select dredging as the *final remedy* for the ABD and excavation as the *final remedy* for the Uplands soils”) (emphasis added).

consider whether additional investigation and a possible second phase of remediation might be required for the ABD Study Area.

With absolutely nothing in the Region’s original proposal to suggest that additional investigation and remediation obligations above and beyond the already approved “final remedy” might be imposed on DuPont, there is simply no basis to conclude that the inclusion of such requirements in the final Permit Modification was reasonably foreseeable, or was somehow a “logical outgrowth” of the original proposal. This is particularly the case given the fact that neither the HSWA Permit nor EPA’s corrective action guidance contemplate that such requirements could be included as part of a permit modification, which, as discussed above, is meant for final remedy selection only. “Whatever a ‘logical outgrowth’ of [the] proposal may include, it certainly does not include the Agency’s decision to repudiate its proposed interpretation and adopt its inverse.”⁶⁹ Indeed, it is in precisely this type of situation where EPA itself has indicated that additional notice and comment should be considered.⁷⁰

In sum, the Region’s decision to include the additional investigation and remediation requirements in Conditions III.E.1.d-E.1.f and III.E.2 of the final Permit Modification imposes significant additional burdens on DuPont, and represents a substantial departure from the draft permit modification, from the process and framework set forth in DuPont’s HSWA Permit, and from EPA’s established corrective action procedures. *At the very least*, then, the Region should have reopened the comment period to provide an adequate opportunity for DuPont and the public at large to provide written comments on the new conditions. Though the “logical outgrowth” test may be deferential to the agency and easily met in many circumstances, it is precisely in this

⁶⁹ *Environmental Integrity Project*, 425 F.3d at 998.

⁷⁰ See Ex. 13, 1991 Guidance, at p. 4-5 (“Additional comment opportunities are particularly appropriate if information obtained after the SB [Statement of Basis] was prepared is relied upon to change or select another remedy.”).

context that the Board has concluded that reopening of the public comment period is required, and that EPA's failure to do so constitutes an abuse of discretion.⁷¹

III. The Timeframes for the Additional Investigations Required in the Final Permit Modification are Unreasonable and Unattainable.

The Board will invalidate compliance deadlines set by the Region when these deadlines are “unreasonable on their face.”⁷² Here, apart from the foregoing errors, the final Permit Modification requires DuPont to submit planning documents to the Region within timeframes that are patently unreasonable. The Permit Modification requires DuPont to submit to the Region a Sediment Sampling Plan (“SSP”) and an updated Remediation and Restoration Plan (“RRP”) for the Upland Soils Area “[w]ithin 30 days of the effective date of” the final Permit Modification.⁷³ Prior to submitting these plans, DuPont is required to confer with the Region, NJDEP and the USFWS.⁷⁴ These provisions thus require DuPont to perform three tasks within 30 days: (1) develop a draft SSP and RRP in anticipation of meetings with the three agencies; (2) arrange and conduct meetings with the three agencies; and (3) incorporate the three agencies’ feedback in the draft SSP and RRP. Based on DuPont’s experience in working with a variety of government agencies on this project and others, even arranging meetings with the appropriate representatives of the Region, NJDEP and USFWS within a fixed 30-day period will be extremely difficult, if not impossible. This challenge is compounded by the fact that such a

⁷¹ See, e.g., *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 761 (E.A.B. 2008) (holding that Region III abused its discretion by not re-opening the public comment period when the Region significantly altered its interpretation of Agency policy in its final permit decision); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 148 (E.A.B. 2006) (holding that the permitting authority abused its discretion by not providing an opportunity for public comment on its decision to alter the allowed physical layout of the permitted facility in the final permit).

⁷² *In re Gen. Elec. Co.*, 4 E.A.D. 358, 384 (E.A.B. 1992) (explaining that the Board will not defer to permit schedules set by the Region that are “unreasonable on their face”).

⁷³ See Ex. 1, Final Permit Modification, Conditions III.E.1.d.(1) & III.E.2. Both of these provisions allow DuPont to submit these plans “by such other date as is approved by EPA.” *Id.*, Modules III.E.1.d.(1) and III.E.2. But, EPA has only indicated that it will require DuPont to adhere to this 30 day deadline. At a public information session held on January 15, 2013, EPA’s presentation stated that both the SSP and RRP will be due 30 days after the Permit Modification’s effective date. Ex. 14, EPA, “Final RCRA/HSWA Permit Modification Public Information Session,” at 11 (Jan. 16, 2013).

⁷⁴ See Ex. 1, Final Permit Modification, Conditions III.E.1.d.(2) & III.E.2.

meeting or meetings must be sequenced to allow time for drafting both plans and then revising them. As a consequence, DuPont asserts that it is not possible, and is unreasonable on its face, to expect that these conditions can be met, and that the Board should therefore grant review.⁷⁵

In addition to the SSP and RRP, DuPont must submit to the Region within 30 days of the Permit Modification's effective date an updated Corrective Measures Implementation Work Plan ("CMIWP") and a design for a Sampling and Monitoring Program ("SMP") for the entire lake system.⁷⁶ These deadlines are also unreasonable because they provide DuPont with insufficient time to consult with the Region and thereafter submit these documents. DuPont cannot prepare the CMIWP and SMP without consulting with the Region because the final Permit Modification does not clearly specify the contents of these plans. For example, in drafting the updated Appendix F to the CMIWP, DuPont will need to seek clarification on the scope of the revisions the Region requires because the final Permit Modification specifies that DuPont should submit revisions "with respect to the dredging operation."⁷⁷ At the same time, the Statement of Basis indicates that the CMIWP must be updated "to address any changes necessary to implement the final remedies."⁷⁸ Such ambiguities will require consultation with the Region to clarify the scope of the revisions DuPont must make. Additionally, developing the SMP will require DuPont to consult extensively with the Region because Condition III.E.1.e. of the Permit Modification only specifies a limited list of parameters for monitoring. With many aspects of what the SMP must contain unspecified in the final Permit Modification, DuPont will need additional guidance from the Region in order to ensure that its submission complies with the requirements of the Permit Modification in order to avoid the risk of penalties for

⁷⁵ See *In re Beazer East, Inc.*, 4 E.A.D. 536, 543 (E.A.B. 1993) (requiring a showing that a permittee would be unable to meet deadlines in order to sustain a challenge).

⁷⁶ See Ex. 1, Final Permit Modification, Conditions III.D.1. and III.E.1.e.

⁷⁷ See *id.*, Condition III.D.1.

⁷⁸ See Ex. 3, Final Statement of Basis, at 15.

noncompliance. As is explained above, coordinating meetings with the Region and incorporating the Region's feedback into draft plans is an important, yet time-consuming, process that cannot be completed within a single month. When one also considers that DuPont is also required to develop the SSP and RMP concurrently with the CMIWP revisions and the SMP, it becomes evident that the Region set deadlines that cannot possibly be met. The Board's review is necessary to grant DuPont relief from such unreasonable permit conditions.

IV. There is No Scientific Basis in the Administrative Record to Support the Region's Decision to Increase the Volume of the Originally Proposed and Approved Dredging Area by Nearly 85%.

Apart from the new investigation and remediation requirements discussed above, the final Permit Modification also requires DuPont to dredge sediment from an expanded area of Pompton Lake, from the 26-acre area that was approved by the Region and NJDEP in 2009 and identified in the November 2011 draft permit modification ,to a new 40-acre area.⁷⁹ According to DuPont's calculations, this translates into the removal of an additional 57,200 cubic yards of sediment (an 83% increase in that originally proposed and approved), and the installation of an additional 23,800 cubic yards of backfill material.

In the Responsiveness Summary accompanying the final Permit Modification, the Region explains in several places that the final action requires DuPont to dredge sediment from an expanded 40-acre area of the ABD, but nowhere does the Region provide a rationale for this conclusion.⁸⁰ This failure is in itself a clear error that warrants a remand, since without an articulated basis for the Region's conclusions, the Board "cannot properly perform any review

⁷⁹ See Ex. 3, Final Statement of Basis, at 13, 16; Ex. 4, Responsiveness Summary, at 5, 13. The Region estimated that expanded dredging area would encompass approximately 40 acres. See Ex. 3, Final Statement of Basis, at 3. Based upon the site figure included in the Permit Modification and the location of the new "RAO line," DuPont has calculated the removal area and concurs with this 40-acre estimate. However, the volume of sediment now required to be removed has doubled. Thus, the dredging area is 50% larger than that originally proposed and the dredging volume is 83% larger than that previously approved by the Region.

⁸⁰ See Ex. 4, Responsiveness Summary, at 5, 13.

whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality.”⁸¹

Further, the Region offers no explanation for why the analysis supporting the dredging of the original 26-acre area is no longer valid. DuPont identified this area for dredging in its 2009 RASR/CMS, a document that was approved by the Region and NJDEP that same year. In the RASR/CMS, DuPont developed the original “RAO Line” (*i.e.*, the area within which remedial action objectives must be achieved within Pompton Lake) based on three lines of evidence that were selected for the purpose of “identifying and minimizing the site specific conditions that foster mercury methylation.”⁸² The first line of evidence was the ABD’s sediment profile, which indicated that the highest concentrations of mercury and methylmercury were within the area bounded by the original RAO line.⁸³ Furthermore, these high concentrations within the original RAO line could be attributed to historical manufacturing activities, as opposed to background conditions.⁸⁴ The RASR/CMS next examined the areas where mercury was most likely to become bioavailable through methylation and reached the conclusion that such areas were those that were closest to the shore and within the original RAO line.⁸⁵ Finally, the RASR/CMS set the RAO line based on a study of where in the lake mercury and methylmercury were most likely to mobilize and enter the water column. This line of evidence also supported the conclusion that

⁸¹ *In re Gov’t of D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 342-43 (E.A.B. 2002); *see also In re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 473 (E.A.B. 2004) (when presented with technical issues, the Board “look[s] to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record... “The Region’s rationale for its conclusions, however, must be adequately explained and supported in the record.”); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999) (citing cases that the Board remanded where a Region’s decision on a technical issue was illogical or inadequately supported by the record); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (E.A.B. 1997) (remanding RCRA permit because permitting authority’s rationale for certain permit limits was not clear and therefore did not reflect considered judgment required by regulations).

⁸² *See* Ex. 10, RASR/CMS, at 15. The Final Statement of Basis acknowledges that the appropriate criteria to consider are those that would cause mercury to convert to methylmercury. *See* Ex. 3, Final Statement of Basis, at 7.

⁸³ *See* Ex. 10, RASR/CMS, at 15-16.

⁸⁴ *Id.*, at 15.

⁸⁵ *Id.*, at 16.

near-shore areas within the original RAO line were those with the greatest potential for mercury to mobilize.⁸⁶

DuPont is unaware of any new data or other site information generated since 2009 that would provide a basis for the Region now to question the analysis (or the assumptions underlying this analysis) contained in the RASR/CMS, and to suddenly expand the previously-approved dredging volume by nearly 85%. In fact, the Region recognized in its final Statement of Basis the multiple lines of evidence that were utilized to support the original RAO Line.⁸⁷ In the absence of any explanation or new data to support EPA's conclusion, a remand to the Region is warranted.

CONCLUSION

The Region properly implemented the corrective action requirements of DuPont's HSWA Permit and relevant guidance, but only to a point. Procedurally, the Region approved a final remedy for the ABD Study Area in 2009; requested an application to modify the HSWA Permit to incorporate the approved final remedy; reviewed the application to modify the HSWA Permit submitted by DuPont on April 1, 2011; issued a draft permit modification incorporating the approved final remedy in November 2011; and accepted public comments on the approved final remedy through mid-January 2012.

Then, after considering the comments that were received during the public comment period, and additional comments from the USFWS submitted after the close of the comment period, the Region reconsidered the approved final remedy, and changed its decision. As reflected in the conditions of the final Permit Modification, the Region decided that, while dredging portions of Pompton Lake and excavating soils in the Upland Area is still appropriate,

⁸⁶ Ex. 10, RASR/CMS, at 16-17.

⁸⁷ See Ex. 3, Final Statement of Basis, at 11.

further assessment and studies are necessary to define additional potential areas of contamination; to determine if additional or different corrective measures may be needed due to inadequately characterized ecological impacts; and if necessary, to define additional or different remedial action objectives based on the results of these future assessments and studies.

DuPont does not dispute that the Region may conclude that further study and evaluation of the ABD Study Area is needed, based on the input the Region received on the proposed final remedy. However, under the terms of DuPont's HSWA Permit and EPA's national guidance on the corrective action process, the Region may not impose such requirements through the permit modification procedure authorized by the HSWA Permit, the sole purpose of which is to establish the terms of the final remedy selected by the Region, after the Region is satisfied that all necessary information has been gathered and fully assessed.

For the foregoing reasons, DuPont respectfully requests that the Board grant this Petition for Review, and enter an Order:

(1) vacating all conditions in the final Permit Modification that were added by the Region after the public comment period; or

(2) remanding the final Permit Modification to the Region with instructions to (a) withdraw the final Permit Modification, (b) request DuPont to perform additional studies and evaluations of the ABD Study Area deemed necessary by the Region under and to the extent authorized by DuPont's existing HSWA Permit, and (c) prepare a permit modification in accordance with the terms of DuPont's existing HSWA Permit only after the Region is satisfied that all necessary studies and evaluations have been completed and the Region has selected a final remedy for the ABD Study Area.

In accordance with the Board's procedures, DuPont reserves the right to request oral argument upon the close of briefing.

Respectfully submitted,

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