IN THE MATTER OF GSX SERVICES OF SOUTH CAROLINA, INC.

RCRA Appeal No. 89–22

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided December 29, 1992

Syllabus

This is a petition for review of the federal portion of a permit issued by Region IV under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act. The Petition—filed by GSX Services of South Carolina, Inc. (GSX)—seeks review of a permit for GSX's hazardous waste treatment, storage, and disposal facility in Pinewood, South Carolina. GSX asks that review be granted with respect to: (1) the three-year permit term; (2) the permit's definition of "solid waste management unit"; (3) the designation of certain units as Solid Waste Management Units (SWMUs); (4) the requirement that GSX submit a sample waste analysis plan within sixty days of the effective date of the permit; (5) the requirement that GSX test all off-site generated waste and waste from a representative sample of every 100th vehicle delivering hazardous wastes; (6) the requirement that GSX update exposure information; (7) the Region's failure to permit certain units; (8) the permit's minimum technology requirements; and (9) the inclusion of facility location standards which were not identified in the draft permit.

Held: The permit is remanded and the Region is ordered to: (1) establish a new permit term and allow GSX and other interested parties an opportunity to submit comments; (2) determine whether an area designated as SWMU #4 should be removed from the permit; (3) remove the permit condition requiring GSX to update the exposure information report; (4) reevaluate the permit's minimum technology requirements in light of the new rules addressing liners and leak detection systems for hazardous waste land disposal units; and (5) publicly notice the permit's facility location requirements and allow GSX and other interested parties to submit comments. Review is denied with regard to all other issues.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

I. *BACKGROUND*

GSX Services of South Carolina, Inc. (GSX) has filed a petition seeking review of the federal portion of a permit issued by Region IV under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.A. §§ 6901–6992k.[1] As requested by the Agency's Chief Judicial Officer,[2] the Region filed a response to GSX's petition for review.

GSX operates a commercial hazardous waste and industrial waste treatment, storage, and disposal facility located in Pinewood, South Carolina. The facility handles hazardous wastes from a variety of sources including industrial sources, hazardous waste storage facilities, waste site cleanup companies, waste storage and treatment companies, and transporters. Existing waste-handling operations include a 2000-drum storage building, a 2000-drum waste solidification building for containers and selected bulk materials, and a 125-acre secure landfill. The final HSWA permit (dated July 27, 1989) requires, among other things, investigation of four of the facility's solid waste management units (SWMUs) and regulates the facility's land disposal operations. GSX argues on appeal that: (1) the Region improperly limited the permit term to three years; (2) the permit improperly defines "solid waste management unit"; (3) certain units were improperly designated as Solid Waste Management Units (SWMUs); (4) the requirement that GSX submit a sample waste analysis plan within sixty days of the effective date of the permit is unconstitutionally vague; (5) the permit improperly requires that GSX test all off-site generated waste and waste from a representative sample of every 100th vehicle delivering hazardous wastes; (6) the requirement that GSX update exposure information exceeds the Agency's statutory authority; (7) the Region failed to permit certain units in violation of RCRA; (8) the permit's minimum technology require-

[1] The non-HSWA portion of the permit was issued by the State of South Carolina, an authorized State under RCRA § 3006(b), 42 U.S.C. § 6926(b).

[2] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

ments are arbitrary and capricious; and (9) the inclusion of facility location standards in the final permit is improper.

II. *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the Petitioner. *See Pollution Control Industries of Indiana, Inc.,* RCRA Appeal No. 92–3, slip op. at 3 (EAB, August 5, 1992); *Sandoz Pharmaceuticals Corp.,* RCRA Appeal No. 91–14, slip op. at 3 (EAB, July 9, 1992).

1. *Permit Term*

As a threshold matter, GSX objects to the 3-year term established in the permit. The final permit states that it "is effective as of September 1, 1989, and shall remain in effect until September 1, 1992 * * *."[3] The draft permit did not, however, contain either an effective or an expiration date. GSX argues that the Region failed to provide an adequate rationale for the 3-year term in the final permit. We agree.

Although the Region is correct in asserting that establishing a permit term is an exercise of discretion which should, in most cases, be determined at the Regional level (Region's Response at 3–4), the Region must provide an adequate rationale for its determination. *In re Chemical Waste Management, Inc.,* RCRA Appeal No. 87–12, unpub. op. at 7–8 (Adm'r, May 27, 1988) (permit term must reflect the Region's "considered judgment").

The Region explains in its Response that the 3-year term was selected to coincide with the State permit term. Region's Response

[3] Under the rules governing this appeal, the petition stayed the effective date of this permit and the expiration date. 40 C.F.R. § 124.15. In order to ensure a viable permit following appeal, however, GSX would have been well advised to seek renewal in accordance with the procedures established in 40 C.F.R. Part 270, Subpart B, so that the provisions of the expired permit would have stayed in effect pursuant to 40 C.F.R. § 270.51. Had the Board determined that the Region had provided adequate support for the permit's 3-year term, the permit would have expired and this case may have become moot.

at 5. There is nothing in the pre-existing record, however, to document this rationale for the 3-year term.[4] As such, the record does not reflect the "considered judgment" necessary to support the Region's determination. Accordingly, the permit is remanded and the Region is directed to establish a new permit term and to allow the permittee and other interested parties an opportunity to submit comments before establishing a new permit date.[5]

2. *SWMU Definition*

GSX contends that the permit improperly defines the term "solid waste management unit."[6] Specifically, GSX argues that because "SWMU" is not defined in RCRA or its implementing regulations, "the Region lacks any regulatory or statutory basis for this definition." Petition for Review at 6. In addition, GSX contends that the permit's definition conflicts with the statutory definition of "solid waste management" by providing that unintentional acts can create a SWMU. According to GSX, a SWMU can arise only from the intentional management of hazardous waste. We reject both assertions.

First, as the Board has recently stated, although neither the statute nor the regulations expressly define "SWMU", the terms "solid waste management" and "unit" are defined. *See General Motors Corporation, Delco Moraine Division (North and South Plants),* RCRA Consolidated Appeal Nos. 90–24, 90–25, unpub. op. at 4 (EAB, Nov. 6, 1992). "Solid Waste Management" is defined as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." RCRA § 1004(28), 42 U.S.C. § 6903(28). The term "unit" refers to any contiguous area of land on or in which waste is placed. *See* 47 Fed. Reg. 32,289 (July 26, 1982). Based upon these definitions, "the term 'SWMU' plainly includes any unit

[4] The Region in its Response also states that it selected a 3-year term after considering "Congressional actions to limit the duration of permits as well as the facility's proximity to a wetlands in light of EPA's forthcoming locations standards." Region's Response at 4. There is nothing in the record on appeal, however, to document this rationale and we express no opinion as to whether this rationale would have supported a 3-year term.

[5] In this connection, we express no view on whether or not a 3-year term would be appropriate for this facility.

[6] Permit Condition I.G.3. defines "Solid Waste Management Unit" as:

> [A]ny unit which has been used for the treatment, storage, or disposal of solid waste at any time, irrespective of whether the unit is or ever was intended for the management of solid waste. RCRA regulated hazardous waste management units are also solid waste management units.

(contiguous area of land on which waste is placed) used for solid waste management (the systematic collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid waste)." *Morton International, Inc. (Moss Point, Mississippi),* RCRA Appeal No. 90–17, unpub. op. at 4 (Adm'r, Feb. 28, 1992). The permit's definition is consistent with these definitions.

Second, as we recently held in *General Motors, supra,* at 5, the legislative history of RCRA § 3004(u) clearly indicates that the term SWMU embraces any unit at which solid waste management actually occurred regardless of whether such management was intended. *See* H.R. Rep. No. 198, 98th Cong., 1st Sess. Part 1, 60 (1983) (Under RCRA § 3004(u), the Agency should examine all units "from which hazardous constituents might migrate irrespective of whether the units were intended for the management of solid and/or hazardous wastes."); 50 Fed. Reg. 28,712 (July 15, 1985). We therefore reject GSX's assertion that only a unit intended for managing solid or hazardous waste may be considered a SWMU.

3. *Erroneous SWMU Designations*

Permit Condition II.A.1. imposes the requirements of part II of the HSWA permit on those SWMUs listed in Appendix A, Paragraph I.[7] These SWMUs include certain excavated emergency spill control sumps (SWMU #2) and an old scrap area (SWMU #4). GSX contends that the Region improperly included these units in the final permit. GSX explains that on June 7, 1988, it and Region IV signed a RCRA § 3008(h) order[8] addressing the units listed in Appendix A. With regard to SWMU #2, the Order states that a site inspection revealed no visible signs of release. The SWMU was not, therefore, included in the § 3008(h) Order. Similarly, the Region did not have sufficient evidence of a release to include SWMU #4 in the Order. Nevertheless, the Region now contends that a sufficient factual basis exists for requiring further investigation at both SWMUs.

[7] Part II of the permit requires, among other things, a RCRA Facility Assessment (RFA) and a RCRA Facility Investigation (RFI).

[8] RCRA § 3008(h)(1) states, in part:

> Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health and the environment * * *.

With regard to SWMU #2, the Region points to a sampling report submitted by GSX on March 17, 1987—a year *before* the § 3008(h) Order was signed. The Region states that in the spring of 1989, one of its engineers examined this report and discovered that it "documented the presence of volatile organic constituents in soil samples taken in the location of SWMU #2." Region's Response at 10. With regard to SWMU #4, the Region argues that:

> The initial 1984 RFA report set out that the nature of SWMU number 4, is not completely known and the SWMU is in an area of shallow contaminated ground water. Because of the lack of information on the source of ground water contamination and this SWMU's close location to the contamination, the Region determined * * * a sufficient factual basis existed for listing the SWMU in the permit as requiring further investigation.

Region's Response at 11–12.

In its Petition for Review GSX contends that because the Region examined the 1987 report prior to signing the § 3008(h) Order and concluded that no release had occurred from either SWMU #2 or #4, "it is now estopped from revisiting that Order in the context of this permit." Petition for Review at 9. In addition, GSX contends that the listing of these units exceeds the Region's statutory authority under RCRA § 3004(u) because EPA has failed to demonstrate that a release has occurred at either of these units. Although we reject GSX's estoppel argument, we conclude that, with regard to SWMU #4, the permit must be remanded.

It is well settled that the Agency need not definitively establish that a release has occurred before imposing corrective action requirements. Rather, the Agency may impose such requirements where it suspects a release or determines that a release is likely to have occurred. *See In re Sandoz Pharmaceuticals Corp.,* RCRA Appeal No. 91–14, slip op. at 11 (EAB, July 9, 1992); *In re Marathon Petroleum Co.,* RCRA Appeal No. 88–24, unpub. op. (Adm'r, Nov. 16, 1990). *See also* RCRA Facility Investigation Guidance, at 1–6 (Interim Final; EPA Office of Solid Waste, May 1989) (suspected release is sufficient to require further investigation).

In the present case, the Region concluded, based on the 1987 report submitted by GSX, that a release at SWMU #2 was likely.

According to this report, test results of soil samples from the area around the SWMU indicated the presence of volatile organic constituents. *See* Response to Comments at 7. GSX does not dispute this finding but contends that the Region is estopped from revisiting the § 3008(h) Order. *See* Petition for Review at 9. It is well settled, however, that estoppel does not apply to the government on the same terms as other litigants. *Heckler* v. *Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 60 (1984). To succeed, a party arguing for the application of estoppel against a government agency must, in addition to establishing the traditional elements of estoppel, show some affirmative misconduct. *See Miller* v. *United States,* 907 F.2d 80, 82–83 (8th Cir. 1990). In the present case, GSX has not alleged, nor does the record on appeal indicate, that the Region engaged in any misconduct warranting application of the doctrine of estoppel. Although we agree that the Region should have been more diligent in its initial review of the 1987 report, we conclude that the record on appeal supports the Region's determination. That is, the presence of volatile organic constituents in the soil surrounding SWMU #2 is sufficient to justify further investigation of this unit. As the Region stated in its response to comments, although the § 3008(h) Order indicated that there were no visible signs of a release, the units were not easily accessible and a reevaluation of the sampling report provided by GSX indicated that some soil contamination had occurred. Response to Comments at 7. Under the circumstances we agree that further investigation is appropriate. Review is therefore denied.

With regard to SWMU #4, however, because the record on appeal is inconclusive as to whether or not a release has occurred or is likely to have occurred, and because the Region itself has reached conflicting results in this regard, the permit is remanded. On remand, the Region is instructed to reexamine the permit's requirement that GSX conduct further investigation at SWMU #4 and, if appropriate, delete this unit from the permit. In this connection, the Region may want to consider providing GSX with the opportunity to demonstrate (in accordance with Permit Condition II.C.4.)[9] that any further investigation of this unit is unwarranted.

[9] Permit Condition II.C.4. requires the preparation and submission of an RFI for certain units. If, however, the permittee can provide sufficient justification that a release from a particular unit is not probable, that unit need not be included in an RFI. *See also* Response to Comments at 8 (permittee must prepare an RFI workplan or "provide the justification under Condition II.C.4. that a release is not probable.").

4. *Waste Analysis Plan*

Permit Condition IV.G.1. states:

> The Permittee shall submit a draft waste analysis plan (WAP) that will describe the specific step-by-step procedures that the Permittee will follow, as required pursuant to 40 CFR § 264.13(b), to analyze incoming shipments and on-site treatment of hazardous waste within sixty (60) days of the effective date of the permit. The WAP shall be developed to include an algorithm approach to describing the waste analysis procedures that is capable of being followed and implemented by one who is not familiar with the Permittee's waste analysis procedures. The WAP must include a description of the procedures required to comply with Conditions IV.G.2., IV.G.4., and IV.G.5. of this permit, as required pursuant to 40 CFR § 268.7. The final WAP shall be submitted to EPA within sixty (60) days of receipt of EPA comments on the draft plan.

GSX contends that this provision is improper for three reasons. These are: (1) by failing to specify the requirements for an adequate draft WAP, the permit is unconstitutionally vague; (2) this lack of specificity in the WAP provision violates the Agency's own established standards for due process; and (3) because the required provisions of the WAP are unknown at the time of permit issuance, the Agency must use the formal modification procedures at 40 C.F.R. Part 270, Subpart D before making the WAP part of the permit. For the following reasons, we agree with the Region that none of these arguments justifies review.

First, we reject GSX's argument that the permit is unconstitutionally vague. The permit provides adequate notice of the requirements for the WAP. *See, e.g.,* Permit Conditions IV.G.2.–IV.G.5. & Appendix D. In addition, the permit indicates that the WAP must comply with the applicable Federal regulations (40 C.F.R. §§ 264.13(b), 268.7). 40 C.F.R. § 264.13(b) provides, *inter alia,* that a WAP must, at a minimum, specify:

> (1) The parameters for which each hazardous waste * * * will be analyzed and the rationale for the selection of these parameters * * *;

> (2) The test methods which will be used to test for these parameters;
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> (3) The sampling method which will be used to obtain a representative sample of the waste to be analyzed * * *;
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> (4) The frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up to date; and
>
> (5) For off-site facilities, the waste analysis that hazardous waste generators have agreed to supply.

We conclude that these provisions provide GSX with sufficient notice of the conditions which must be included in the WAP. GSX's arguments to the contrary are therefore rejected.

Similarly, for the reasons stated above, the permit's WAP requirements do not lack the degree of specificity necessary to satisfy the Agency's due process standards. That is, GSX has received adequate notice of the provisions which must be included in the WAP as well as an opportunity to comment on these provisions.

Finally, GSX contends that because the requirements of the final WAP are unknown at the time of permit issuance, the plan submitted under Permit Condition IV.G.1. must be incorporated into the permit under the formal modification provisions of 40 C.F.R. § 270.41. We disagree. As noted above, GSX has been given sufficient notice of the provisions which must be included in the final WAP. That is, the permit makes clear that the plan must incorporate those provisions required by the applicable regulations and the waste testing provisions of the permit itself.

We also note that, as required by the regulations,[10] GSX submitted a copy of the waste analysis plan along with its Part B permit application. This plan was incorporated into the final permit as Appendix D. Additional waste testing requirements are included in the body of the permit itself. *See* Permit Condition IV. The Region noted, however, that the waste analysis provisions submitted with GSX's Part B application "were presented throughout various sections of the application." Response to Comments at 17. Given the complexities of analyzing a highly variable waste stream, the Region determined

[10] *See* 40 C.F.R. § 270.14(b)(3); 40 C.F.R. § 264.13 comment.

that GSX should revise the plan to "establish step-by-step sampling and analytical procedures in a single document." *Id.* According to the Region, such revisions "will better enable the Permittee's staff to follow the approved procedures and will facilitate Agency oversight during compliance inspections." *Id.* Thus, it does not appear that GSX will be required to make substantive changes to the permit's existing waste analysis requirements. Rather, the revised plan will simply consolidate and clarify GSX's existing obligations. Where, as here, the revised plan is only a codification of existing permit requirements, we reject the argument that a permit modification will be required to incorporate the revised plan.

5. *Testing of Off-site Generated Waste*

GSX argues that Permit Conditions IV.G.2. and IV.G.4.[11] are "unreasonable, unnecessary and contrary to the intent of the Agency's own regulations." Specifically, GSX contends that these provisions improperly require it to test all off-site generated waste treated on-site prior to disposal. Petition for Review at 13. We disagree.

GSX has proposed the following procedures. In general, GSX proposes to take the information submitted by the generator in a Waste Analysis Request Form, to evaluate the information against a representative sample of the waste, and to develop "fingerprint" criteria which will characterize the waste and help GSX develop an appropriate treatment process. The fingerprint would then be used to determine if later waste shipments conform to the authorized waste. GSX proposes to test only a sample of the treatment residue to determine if it would meet the treatment standards of 40 C.F.R.

[11] Permit Condition IV.G.2. provides:

> To assure that wastes or treatment residues are in compliance with applicable treatment standards set forth in 40 CFR Part 268 Subpart D and all applicable prohibitions set forth in 40 CFR §268.32 or in RCRA Section 3004(d), the Permittee shall obtain waste analysis data from off-site generated hazardous wastes as specified in the Waste Analysis Plan (APPENDIX D) and carry out the confirmatory testing program specified herein.

Permit Condition IV.G.4. provides:

> For off-site generated wastes treated by the permittee to meet applicable treatment standards set forth in 40 CFR Part 268 Subpart D, or applicable prohibitions set forth in 40 CFR §268.32, or in RCRA Section 3004(d), the permittee shall test every batch of treated waste prior to landfill disposal. The test results of each treated batch, including test results for batch treatment that failed to meet a treatment standard, shall be maintained in the facility operating record required under Condition I.D.9.b.

§ 268. Future waste shipments would then be treated according to a predetermined process and the treatment residue periodically tested. Waste shipments would be tested only semi-annually. GSX contends that it need not test all future shipments "because the fingerprint analysis assures that the composition of the waste is consistent and Permittee's pre-determined treatment procedures assure that the treatment is consistent." Petition for Review at 14. Thus, according to GSX, the requirement that it test all wastes treated on-site is unnecessary. GSX also contends that, in light of this "fingerprint" analysis, Permit Condition IV.G.2.a., which requires that the permittee test one representative sample of waste from every one hundred vehicles delivering hazardous waste to the facility which is manifested as meeting the Part 268 Subpart D treatment standards without further treatment, is arbitrary and unnecessary.

Determinations regarding the frequency and types of testing at land disposal facilities are established on a site-by-site basis and are best resolved at the Regional level. *See* 55 Fed. Reg. 22,669 (June 1, 1990) (frequency of testing is best determined on a case-by-case basis).[12] Absent evidence that such determinations are clearly erroneous or involve important policy questions, the Board will not ordinarily grant review. In the present case, the Region has concluded that the "fingerprint" analytical procedure does not ensure that variations in the chemical content or concentrations of a particular waste stream will be properly taken into account. Such variation, the Region contends, could result in a failure to meet the treatment standards of 40 C.F.R. § 268.[13] As the Region stated in its Response to Comments:

> The Agency believes that to ensure compliance with 40 CFR § 268 Subpart D, the Permittee must test all on-site treated waste for a sufficient period to demonstrate the consistency of the treatment process. Testing of each waste shipment treated by the

[12] The D.C. Circuit has recently upheld the Agency's authority to require corroborative testing on a case-by-case basis. *See Chemical Waste Management Inc.* v. *EPA,* 35 ERC 1329, 1355 (D.C. Cir. 1992).

[13] We note that the Region has indicated that GSX will only be required to test all on-site treated waste "for a sufficient period to demonstrate the consistency of the treatment process." Response to Comments at 18. Moreover, the Region states that "once the Petitioner develops a sufficient data base to demonstrate that the treatment process for a particular waste stream consistently meets the § 268 treatment standards, the Region will consider a request by the Petitioner for a less frequent testing schedule of that waste stream." Region's Response at 17; Response to Comments at 18–19.

> Permittee must continue until such time that the Permittee has developed a sufficient data base to demonstrate that the treatment of a specific waste stream consistently yields treated wastes that meet the treatment standards.

Response to Comments at 18–19. Nothing in the Petition for Review or in the record on appeal convinces us that this determination was clearly erroneous or otherwise warrants review. In addition, we agree with the Region's determination that it is appropriate to test every 100th vehicle containing wastes which are manifested as meeting the Part 268 Subpart D treatment standards without further treatment prior to disposal. The Region reasoned that such confirmatory testing "is necessary for identifying potential problematic waste streams and/or generators that submit erroneous certifications." Response to Comments at 21. Again, nothing in the Petition for Review or in the record on appeal convinces us that this determination was clearly erroneous or otherwise warrants review.

Similarly, we find no reason to review a provision in Permit Condition IV.G.3. requiring GSX to notify the Region of any discrepancies between the certification submitted by the generator and the confirmatory testing performed by GSX. *See* 40 C.F.R. § 268.7(a)(2) (requiring the generator to certify that restricted waste can be land disposed without further treatment). The Region included this condition under the authority of the RCRA omnibus provision, § 3005(c)(3). *See* 42 U.S.C. § 6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."); 40 C.F.R. § 270.32(b)(2). GSX contends that the regulations do not require such reporting and, because GSX already rejects wastes that do not conform to its "fingerprint" analysis, the reporting requirement does nothing to protect human health and the environment. As the Region stated in its Response to Comments, however, this condition was included to:

> [E]nsure that the Agency is kept informed of the occurrence of erroneous certifications. Such notifications will assist the Agency in taking the necessary actions to ensure that hazardous waste disposed in land units meets the 40 CFR Part 268 concentration levels that have been determined protective of human health and the environment.

Response to Comments at 23. We find no reason to review this determination. We note that the regulations require owners or operators to report discrepancies on the manifest supplied by the generator if such discrepancies are not resolved within 15 days. *See* 40 C.F.R. § 264.72. Ensuring the integrity of generator certifications at a large facility which accepts wastes from different generators will certainly help ensure protection of public health and the environment, by helping the Region identify those generators that are not properly testing and disposing of their hazardous wastes. Accordingly, we find nothing unreasonable in this case in extending this requirement to discrepancies in the generator certification.

6. *Exposure Information*

GSX objects to a provision in Permit Condition V requiring it to provide "any exposure information necessary to update the Exposure Information Report" submitted by GSX as part of its Part B permit application. As authority for this provision, the Region relies on RCRA § 3019(a), 42 U.S.C.A. § 6939a(a). That section provides, in part:

> [E]ach application for a final determination regarding a permit under section 6925(c) of this title for a landfill or surface impoundment shall be accompanied by information reasonably ascertainable by the owner or operator on the potential for the public to be exposed to hazardous wastes or hazardous constituents through releases related to the unit.

GSX argues that nothing in section 3019 requires a permittee to update the exposure information report during the permit term and the requirement should therefore be removed from the permit. We agree. The Region has not identified any legal basis for this permit provision and we can find none. Neither RCRA nor its implementing regulations requires updates of the exposure assessments submitted with the permit application. Moreover, the Region has failed to convince us of the need for such a provision under RCRA's omnibus authority.[14] Thus, on remand, the Region is instructed to remove this permit provision.

[14] The Region has adequate authority to deal with potentially dangerous exposures to humans and the environment. The permit already requires GSX to report and investigate releases or likely releases which could pose a danger to the public. For example, the permit's corrective action provisions require GSX to investigate releases from SWMU's. *See* Permit Condition II. Moreover, GSX is required to report "any

Continued

7. *Obligation to Permit Land Disposal Units*

GSX contends that the Region's failure to issue a permit for certain units was arbitrary and capricious and a violation of the Region's "non-discretionary duty" under RCRA § 3005(c)(2)[15] to issue permits for land disposal facilities by November 8, 1988. Comments on Draft Permit at 50–51. These units were identified by GSX as interim leachate storage tanks, interim leachate skid tanks, drum storage, and secondary containment tanks. GSX contends that the operation of these units is necessary in order to comply with the HSWA Minimum Technology Requirements (MTR)[16] performance standards specified in Part VI of the HSWA permit and that it is "improper for the Region to mandate MTRs and then deny Permittee the means to meet those requirements." Petition for Review at 20. We disagree.

First, we reject GSX's assertion that RCRA § 3005(c)(2) requires the Region to include the above-mentioned units in the HSWA permit. The regulations clearly give the Region the authority to issue a permit for certain units and deny a permit for others. *See* 40 C.F.R. § 270.1(c)(4) ("EPA may issue or deny a permit for one or more units at a facility without simultaneously issuing or denying a permit to all units at the facility."). Second, the Region is only required to issue a permit with regard to those units regulated by HSWA and which meet the applicable statutory and regulatory requirements. In the present case, the Region determined that operation of the above-mentioned units is not necessary in order to comply with HSWA or the permit's MTR requirements. Based on the description of these units by the Region and GSX we agree with the Region's determination. Finally, the Region notes that any leachate collected in these units can be stored on a 90-day basis and then either treated on-site or shipped off-site. A permit would not therefore be necessary. *See* 40 C.F.R. § 270.1(c)(2). If, in the future, it becomes clear that GSX needs a permit or permits to operate these units, it may seek

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imminent or existing hazard to public health or the environment from any release of hazardous waste or hazardous constituents from a solid waste management unit." Permit Condition II.F.1.

[15] RCRA § 3005(c)(2)(A)(i), 42 U.S.C. § 6925(c)(2)(A)(i), provides:

> Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

[16] *See* RCRA § 3004(o), 42 U.S.C.A. § 6924(o) (requiring that hazardous waste landfills be designed to incorporate or exceed certain minimum technology requirements).

an appropriate permit modification at that time. On the record before us, however, GSX has not demonstrated any error or exercise of discretion warranting review.

8. *Minimum Technology Requirements—Part VI of HSWA Permit*

GSX objects to various provisions of Part VI of the HSWA permit which implements the minimum technology requirements of RCRA § 3004(o). Specifically, GSX objects to provisions of Part VI.C. (Operating and Maintenance Requirements) establishing operating and maintenance procedures necessary to ensure that the leachate collection/detection systems are functioning in accordance with RCRA and its implementing regulations. GSX also objects to certain provisions of Part VI.D. (Reporting) establishing requirements for reporting installation design and quality control procedures of new landfill cells and for reporting the results of leachate collection/detection system monitoring.

On January 29, 1992, the Agency issued new rules addressing "Liners and Leak Detection Systems for Hazardous Waste Land Disposal Units." 57 Fed. Reg. 3462. Because all of GSX's objections to Part VI of the permit turn in some measure on these new rules, the permit is remanded so that the Region can reevaluate the disputed conditions in light of these new requirements, and, where appropriate, modify the permit accordingly. The Region must also reopen the public comment period to allow interested parties an opportunity to comment on the application of these new landfill and leak detection rules to GSX's facility.[17]

9. *Location Standards*

GSX objects to the inclusion of three conditions in Part VII of the final permit (regarding facility location requirements) which were not present in the draft permit. Specifically, the final permit, relying on the Agency's draft facility location standards,[18] requires that GSX

[17] We note that the new rule amends 40 C.F.R. § 270.4 to require owners and operators to apply for a permit modification to meet the standards of this new rule. In addition, the new rule expressly provides for a reevaluation of all pending and issued permits where construction has not begun. *See* 57 Fed. Reg. 3464–65 ("Owners and operators at permitted facilities may not begin construction of units subject to today's requirements until the permitting agency has approved a permit modification.").

[18] HSWA requires the Agency to issue regulations which "specify criteria for the acceptable location of new and existing treatment, storage, and disposal facilities as necessary to protect human health and the environment." RCRA § 3004(o)(7), 42

Continued

submit three reports within 90 days of the effective date of the permit demonstrating that: (1) the design and operation of the landfill will ensure the protection of adjacent wetlands prior to and beyond the post-closure care period; (2) an adequate buffer zone has been established to mitigate, contain, or eliminate any groundwater releases within the facility's property boundary; and (3) releases of hazardous constituents into the groundwater can be remediated and that the 40 C.F.R. Subpart F corrective action requirements can be achieved. Permit Conditions VII.A.–C. The Region included these provisions in the final permit under the authority of the RCRA omnibus provision. *See* RCRA § 3005(c)(3), 42 U.S.C. § 6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.").

In its petition for review, GSX contends: (1) the facility meets all existing location standards under 40 C.F.R. § 264.18 and that the Region therefore lacks the regulatory authority to impose additional location standards; (2) the Region improperly relied on the omnibus provision; (3) the 90-day period for complying with the permit's facility location standards conflicts with the requirements of RCRA § 3010(b);[19] and (4) the inclusion of facility location conditions in the final permit that were not in the draft permit constitutes an abuse of discretion and deprives GSX of its constitutional right of due process. We conclude that the location conditions must be remanded for public comment.

RCRA § 3004(o)(7) requires the Administrator to "specify criteria for the acceptable location of new and existing treatment, storage, and disposal facilities as necessary to protect human health and the environment." Regulations implementing this requirement have not yet been promulgated and, as the Region concedes, GSX is currently in compliance with all existing location standards. Nonetheless, we agree that the Region may, in appropriate circumstances, require additional conditions to ensure protection of the environment under

U.S.C.A. § 6924(o)(7). Location criteria in response to HSWA have not yet been issued in final form.

[19] 42 U.S.C.A. § 6030(b). That section provides, in part:

> The regulations under this subchapter respecting requirements applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste (including requirements respecting permits for such treatment, storage or disposal) shall take effect on the date six months after the date of promulgation thereof * * *.

the omnibus provision.[20] However, the Region failed to provide the public or the permittee with any opportunity to comment on the final permit's location standards. Ordinarily, the decision to reopen the public comment period on a permit should be left to the sound discretion of the Region. *See* 40 C.F.R. § 124.14(b). Given the significance of the addition of these location standards, however, we find that reopening the record to provide for comment is appropriate. On remand, the Region must publicly notice the location conditions and allow GSX and other interested parties the opportunity to submit comments. We express no opinion on the appropriateness of the permit's location standards.

10. *Effective Date of Permit*

GSX has also raised several objections to the Region's initial determination regarding the effective date of the permit. Apparently, the Region determined that the three-year permit term would begin to run on September 1, 1989, regardless of the filing of the petition for review. In its Response, however, the Region indicates that it is in agreement with GSX that the entire permit is stayed pending a decision by the Board. The issue is therefore moot.

III. *CONCLUSION*

The permit is remanded and the Region is directed to reopen the permit proceedings for the purposes mentioned above.[21] An appeal of the Region's determination on remand will be required to exhaust administrative remedies. On the other issues raised by GSX, review is denied for the reasons set forth above.

So ordered.

[20] *See In re Ecolotec, Inc.*, RCRA Appeal No. 87–14, unpub. op at 3–4 (Adm'r, Dec. 14, 1988) (Region has discretion under the omnibus provision to impose permit terms beyond those required by the rules).

[21] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *See, e.g., In re: Chemical Waste Management, Inc.*, RCRA Appeal No. 87–12, at 5 (Adm'r, May 27, 1988).