IN RE CARIBE GENERAL ELECTRIC PRODUCTS, INC.

RCRA Appeal No. 98–3

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided February 4, 2000

Syllabus

Petitioner Caribe General Electric Products, Inc. ("CGE" or the "company") filed a petition for review of a final permit decision ("Final Permit") issued by EPA Region II ("Region") under the Resource Conservation and Recovery Act ("RCRA") providing for post-closure care of two hazardous waste impoundments associated with CGE's retired electroplating operations at the company's manufacturing facility in Palmer Ward, Municipality of Rio Grande, Puerto Rico (the "Facility"). The Facility is in close proximity to two water bodies, the Rio Mameyes (the Mameyes River) and Honduras Creek. CGE challenges several permit provisions requiring the company to undertake corrective action at eight Solid Waste Management Units ("SWMUs") and two off-site Areas of Concern ("AOCs"). The company challenges:

(1) the imposition of a groundwater notification provision requiring the company to notify the Region and potentially affected parties when hazardous constituents migrate beyond the Facility boundary in greater than background concentrations;

(2) the designation of two off-site AOCs, AOC–1 (Rio Mameyes sediments) and AOC–2 (Honduras Creek sediments) for corrective action;

(3) the application of conditions generally applicable to SWMUs to the AOCs;

(4) the inclusion of a provision for imposing interim corrective measures ("ICMs") without affording CGE the opportunity for notice and comment pursuant to the formal permit modification procedures at 40 C.F.R. § 270.42; and

(5) the designation of six SWMUs at the Facility for further investigation allegedly without taking into consideration past remedial steps taken by CGE.

Held: (1) The Region has provided a fact-specific, human health and environmental justification for the challenged groundwater notification provision consistent with the Board's previous decisions. The totality of the circumstances depicted by the Region — the immediate proximity of the Facility to a river serving as a current and future drinking water source, evidence of recreational swimming in the same river immediately adjacent

to the Facility, and a groundwater plume in close proximity to the river with cadmium concentrations measured above Clean Water Act Maximum Contaminant Levels — warrants use of a groundwater notification provision with a background level trigger in this case;

(2)(a) The Region's Rio Mameyes sediment sampling revealing above-background concentrations of hazardous constituent metals used in the Facility's operations as well as other contaminant indicators establishes a sufficient nexus between the Facility and AOC–1 to justify applying RCRA corrective action authority to off-site contamination. Further, the Region, by pointing to the proximity of AOC–1 to identified swimming and drinking water uses of Rio Mameyes, has made a site-specific finding of a threat to human health and the environment warranting corrective action under RCRA's omnibus provision. However, the Board remands to the Region its designation of AOC–2 because the Region has not provided sufficient evidence on the pivotal questions of whether there is the requisite nexus between AOC–2 and the Facility and whether AOC–2 indeed poses a threat to human health and the environment;

(b) AOC–1 and AOC–2 are not barred from Agency RCRA jurisdiction by 40 C.F.R. § 261.4(a)(2), which excludes from the RCRA definition of "solid waste" "discharges that are point sources subject" to NPDES permits under the Clean Water Act. The purpose of the NPDES point source discharge exclusion was to avoid duplication between the RCRA and NPDES programs, and many of the discharges that potentially impacted the AOCs were not subject to NPDES permitting because they predated passage of the CWA. Also, the Region identifies other potential sources of contamination of the AOCs that would not be covered by the above regulatory exclusion. Finally, requiring corrective action for the two AOCs would not undercut the Agency's stated policy of not using its corrective action authority to duplicate efforts of other regulatory programs since most of the sources of contamination identified by the Region are not covered by the Facility's current NPDES permit;

(3) The Board has previously held that the Agency has the discretion to require the same level of investigation and remediation for AOCs and SWMUs, a point that CGE concedes. Since AOC–1 has been properly designated, the Region can apply to AOC–1 the same requirements it has applied to SWMUs under the Final Permit. Since the Final Permit erroneously designates AOC–2 for corrective action, the Region can only apply SWMU requirements to AOC–2 by providing upon remand a proper basis for AOC–2's inclusion in the Final Permit;

(4)(a) Inclusion of an ICMs provision in the Final Permit is appropriate. Limiting language in the ICMs provision, factors the Region states will guide its decisions as to whether to impose a particular ICM, as well as the particular environmental threats posed by the Facility, provide assurance that the Region will confine its use of ICMs to situations calling for prompt action, and not use ICMs as a means of avoiding formal notice and comment permit modification requirements. The Board makes binding upon the Region its pledge that upon determining that an ICM will be the final corrective measure for site cleanup, the Region will institute formal permit modification measures under 40 C.F.R. § 270.41.

(b) As a general matter, the Region is not legally required to institute formal permit modification procedures, including notice and comment requirements, when imposing ICMs in the Final Permit. The Final Permit provides that plans submitted as a result of the ICMs provision are automatically incorporated into the Final Permit upon their approval by the Region. In accordance with the Board's holding in *In re General Electric Co.,* 4 E.A.D. 615 (EAB 1993), the change therefore does not cause a modification of the Final Permit.

(c) Finally, the ICMs provision does not deny CGE due process. The Final Permit's dispute resolution provision, which is available to CGE in the event it wishes to challenge an ICM, contains all the necessary features the Board has previously deemed sufficient to

protect the due process rights of permittees in situations involving contested interim submissions; and

(5) The Region has properly designated the six challenged SWMUs for corrective action at the Facility. In its Petition for Review of the Final Permit, CGE merely restates its earlier objections to the permit without explaining why any of the Region's prior responses were clearly erroneous.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *BACKGROUND*

Caribe General Electric Products, Inc. ("CGE" or the "company") has filed a Petition for Review ("Petition") dated May 15, 1998, seeking review of a permit issued by U.S. EPA Region II (the "Region") under the Hazardous and Solid Waste Amendments of 1984 ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901–6992. As requested by the Environmental Appeals Board (the "Board"), on July 13, 1998, the Region filed a response to CGE's Petition ("Region's Response").[1] CGE objects to certain corrective action requirements that the Region has included in the permit.[2]

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[1] After the filing of the Region's Response, CGE filed a "Reply to the United States' Response to Petition for Review" ("CGE Reply") with the Board. The Region moved to strike the CGE Reply ("Motion to Strike") on the grounds that it was not accompanied by any motion seeking leave to file as set forth in the EAB Practice Manual and did not set forth an appropriate showing of circumstances to support the filing of such a motion. *See* Motion to Strike. The Board hereby grants the Motion to Strike and strikes the CGE Reply from the record. CGE did not seek leave of the Board to file its Reply and in a number of instances raised new arguments that should have been raised during the comment period and in the Petition, not presented for the first time in the Reply. *See In re Exxon Co., U.S.A.,* 6 E.A.D. 32, 33 n.7 (EAB 1995); *In re General Motors Corp.,* 5 E.A.D. 400, 408 n.13 (EAB 1994) (declining to consider new arguments raised in reply briefs on appeal). Moreover, notwithstanding CGE's allegations that the Reply is necessary to correct the Region's mischaracterizations of data in the administrative record, the Board finds the material issues in this case are adequately covered in the Petition and the Region's Response.

[2] Under RCRA section 3004(u), 42 U.S.C. § 6924(u), permits issued after November 8, 1984, shall require:

> [C]orrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter * * *.

CGE, a subsidiary of General Electric Corporation, owns and operates a facility, located in Palmer Ward, Municipality of Rio Grande, Commonwealth of Puerto Rico, which manufactures residential circuit breakers (the "Facility"). From the inception of operations in 1956 until 1981, CGE conducted electroplating operations at the Facility. The electroplating process generated wastewater, which the company discharged via underground piping to two unlined, onsite surface impoundments ("waste lagoons" or "lagoons A and B").[3] The wastewaters were temporarily held in the waste lagoons to allow particulates in the wastewater to settle out and accumulate as a sludge, which constituted the listed hazardous waste[4] F006.[5] Region's Response, app. H (Draft Permit Fact Sheet at 2 (July 29, 1997)). According to the Part A RCRA permit application that CGE filed in November 1980, the two unlined lagoons accumulated 50,000 pounds per year of F006 listed hazardous waste.[6]

The corrective action requirements that the Region has imposed upon CGE, and to which the company objects, are part of a "Final Post-Closure Permit" ("Final Permit") obligating CGE to provide post-closure care for the two waste lagoons described above. Although CGE had performed certain closure activities on the lagoons pursuant to an earlier consent order,[7] the Region determined that CGE had to submit a permit

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[3] In its application for a Final Post-Closure Permit, *see infra,* CGE stated that the wastewater that its electroplating operation discharged to the two waste lagoons "contain[ed] cadmium, chromium, cyanide, nickel, and zinc." *See* Region's Response, app. H at 1–6 (RCRA Part B Permit Application (July 30, 1996)).

[4] Wastes not otherwise excluded from regulation are considered hazardous either if they exhibit a characteristic of hazardous waste or if they appear on one of the lists of hazardous wastes set forth in 40 C.F.R. § 261.31. *See* 40 C.F.R. § 261.3.

[5] F006 listed hazardous waste includes, with specified exceptions, "wastewater treatment sludges from electroplating operations * * *." *See* 40 C.F.R. § 261.31. Several hazardous constituents formed the basis for this listing, including among others cadmium, hexavalent chromium, nickel, and cyanide (complexed). 40 C.F.R. pt. 261, app. VII.

[6] According to the "Draft Permit Fact Sheet" that accompanied the draft permit, CGE's Part A permit application also indicated that the listed hazardous wastes F007, F008, F009, and F017 and the characteristic hazardous waste D002 were generated and managed in storage containers (barrels and drums), storage tanks, and treatment tanks. Region's Response, app. G at 2 (Draft Permit Fact Sheet (July 29, 1997)).

[7] CGE performed closure activities on the two waste lagoons from November 1989 to September 1991 pursuant to a February 1989 Consent Order. The Consent Order resulted from a RCRA section 3008 action that the Region took against CGE in September 1987 to achieve the closure of the two lagoons, which had stopped receiving wastes in 1981. CGE claims that pursuant to the approved closure plan, CGE, "between November 1989 and September 1991 * * * removed all liquids, sludges, and sludge residues from Lagoons A and

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for continued post-closure work because CGE could not demonstrate that it satisfied the applicable standards in 40 C.F.R. § 264.228 for closure of the two lagoons by "removal" or "decontamination."[8] *See* 40 C.F.R. § 270.1(c)(5) (mandating a post-closure permit unless standards for closure by removal or decontamination are met).

In its Petition, CGE does not contest having to obtain a post-closure permit for the two waste lagoons. Nor does CGE challenge any of the post-closure requirements specific to the two lagoons that appear in a separate portion of the Final Permit.[9] Rather, CGE objects to other corrective action requirements in the Final Permit that apply to certain Solid Waste Management Units ("SWMUs")[10] and Areas of Concern ("AOCs")[11]

B, and either removed, or decontaminated and left in-place, all associated piping and related structures." In 1992, CGE certified closure of the Facility. However, EPA has never approved the certification nor released CGE from the financial assurance requirements at 40 C.F.R. § 265.143. *See* Region's Response, app. F at II–3 (Final RCRA Post-Closure Permit ("Final Permit")).

[8] The Region determined that the above-mentioned lagoons required post-closure permits based on the results of groundwater monitoring conducted from December 1991 to September 1997 near the two waste lagoons. The monitoring revealed exceedances of groundwater protection standards set forth at 40 C.F.R. § 264.94. The company conducted the groundwater monitoring as part of a closure plan mandated by the Consent Order. *See supra* note 7.

[9] Pursuant to the post-closure care requirements at 40 C.F.R. §§ 264.117–120, CGE is required to submit for approval and then operate a groundwater monitoring program and "work plan to characterize the nature and extent of any dissolved cadmium plume which may currently be present in the groundwater beyond the point of compliance." Final Permit at IV–5.

[10] RCRA section 3004(u) requires corrective action "for all releases of hazardous waste or constituents from any *solid waste management unit* at a treatment, storage, or disposal facility seeking a permit under this subchapter * * * . (emphasis added)

Although neither the statute nor the regulations define the term "solid waste management unit," the Agency has developed a working definition of the term through policy guidance and individual permits. *See* Advance Notice of Proposed Rulemaking ("1996 ANPR"), 61 Fed. Reg. 19,432, 19,442 (May 1, 1996). In language closely tracking previous policy statements, the Final Permit at issue in this proceeding defines a SWMU to include:

> any discernible waste management unit at which solid waste has been placed at any time from which hazardous waste, including hazardous constituents, have migrated or may migrate, irrespective of whether the unit was intended for the management of hazardous or solid wastes * * * .

Final Permit at I–13.

[11] The Board has previously upheld the designation of corrective action requirements for non-SWMUs (traditionally designated "Areas of Concern") under the so-called omnibus clause of RCRA section 3005(c)(3), 42 U.S.C. § 6925(c)(3). *See infra* Part II.B.2.

encompassing other locations within and outside the Facility. The basis for the designation of the AOCs and SWMUs was an August 1986 RCRA Facility Assessment ("RFA")[12] that the Region conducted at the Facility, as supplemented by additional information that the company submitted to the Region. Final Permit at II–3 to II–4.

In seeking review of the Final Permit, CGE raises five issues in its Petition. We address these issues in our decision:

> 1) whether the Region clearly erred by imposing a groundwater notification provision;
> 2) whether the Region clearly erred and abused its discretion by designating two off-site AOCs for corrective action;
> 3) whether the Region clearly erred by applying conditions generally applicable to SWMUs to the AOCs;
> 4) whether the Region clearly erred by including a provision for interim corrective measures without affording CGE the opportunity for notice and comment pursuant to 40 C.F.R. § 270.42; and
> 5) whether the Region clearly erred by designating six SWMUs at the Facility for further investigation without considering past remedial steps taken by CGE.

II. *DISCUSSION*

A. *Standard of Review*

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. 40 C.F.R. § 124.19; *see,* e.g.*, In re Austin Powder Co.,* 6 E.A.D. 713, 715 (EAB 1997); *In re Johnston Atoll Chem. Agent Disposal System,* 6 E.A.D. 174, 178 (EAB 1995); *In re Allied-Signal, Inc.,* 5 E.A.D. 291, 292 (EAB 1994). The preamble to section

[12] The RFA is the first stage of a multi-step corrective action process. During the RFA, the Region attempts to identify actual and potential releases of hazardous waste or hazardous constituents. This step typically occurs before a permit is issued. The RFA and subsequent steps of the multi-stage corrective action process are thoroughly described in the Agency's 1996 ANPR, *supra* note 10, 61 Fed. Reg. at 19,443–54. *See also* Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities ("Subpart S Proposal"), 55 Fed. Reg. 30,798 (1990) (proposed July 27, 1990) (describing the corrective action process).

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 * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner. 40 C.F.R. § 124.19(a); *see also Allied-Signal,* 5 E.A.D. at 292.

B. *Petitioner's Claims*

1. *Groundwater notification provision*

Contested condition III.B.10.(a) of the Final Permit requires CGE to provide notice to the Region and "parties potentially affected by the release"[13] whenever hazardous constituents that have been released from a SWMU at the Facility migrate beyond the boundary of the Facility in greater than background concentrations. This provision is closely modeled after a "groundwater notification" provision in the Agency's Subpart S Proposal, 55 Fed. Reg. 30,798 (July 27, 1990),[14] a document which the Agency historically employed as a basic blueprint for carrying out its corrective action authority.[15] CGE argues that permit condition III.B.10.(a)[16]

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[13] In the Final Permit, the Region revised the groundwater notification provision to require notice only to the Region and "affected" parties. The draft permit required notice to both the Region and "any person who owns or resides on the land which overlies the contaminated groundwater." *See* Final Permit at III–15; Region's Response, app. A at 101 (Responsiveness Summary ("Response to Comments")).

[14] The groundwater notification provision that served as a model for the one in the contested permit is found at § 264.560 of Subpart S Proposal, *supra* note 12. 55 Fed. Reg. at 30,882.

[15] The Agency recently announced that it would withdraw most of the Subpart S Proposal, which it previously had intended to incorporate into a final rule, and instead rely on current regulations, supplemented by current and planned guidance, to implement the corrective action program. *See* Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, 64 Fed. Reg. 54,604, 54,606 (partial withdrawal of rulemaking proposal) (Oct. 7, 1999). In its announcement, the Agency also stated that its 1996 ANPR, *supra* note 10, which updated many aspects of the Subpart S Proposal, would now serve as "the primary corrective action guidance." 64 Fed. Reg. at 54,607 (citing 1996 ANPR, 61 Fed. Reg. 19,432 (May 1, 1996)). However, the Agency noted that previous policy guidance documents, such as the Subpart S Proposal, would "still continue * * * to provide guidance for corrective action implementation." *Id.* In accordance with these statements, we will refer to appropriate portions of the Subpart S Proposal that have not been replaced or superseded by the 1996 ANPR.

[16] Permit condition III.B.10.(a) states:

> If at any time the Permittee discovers that hazardous constituents in the groundwater have been released from a solid waste management unit at the facility, and

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is clearly erroneous and an abuse of discretion because the Region has provided no fact-specific, human health or environmental justification for the notification provision.

Both parties agree on the basic criterion governing the proper inclusion of this provision, which is whether the provision is necessary to protect human health and the environment. In *In re Allied Signal, Inc.,* 4 E.A.D. 748 (EAB 1993), we remanded a groundwater notification provision because the Region failed to make a "fact-specific" demonstration on the record that the groundwater posed a threat to public health and the environment.[17] *Id.* at 757–62. Our emphasis on the need for a *site-specific* showing of such a threat in *Allied* flowed from previous decisions and the Agency's own policy declarations, which stated that RCRA permit conditions not required by final regulation, but instead based on policy guidance (such as the groundwater notification provision at issue here), must be defended as appropriate on a case-by-case basis. *See In re General Motors Corp., Delco Moraine Div.,* 4 E.A.D. 334, 343 n.15 (EAB 1992). Even apart from the need to ensure legal compliance, Agency guidance documents on corrective action state the pragmatic need to tailor RCRA corrective action requirements to site-specific conditions in order to "avoid imposing unnecessary or inappropriate burdens upon the permittee." *In re American Cyanamid Co.,* 3 E.A.D. 657, 661 (Adm'r 1991); *see,* e.g., 1996 ANPR, 61 Fed. Reg. at 19,434 ("No two cleanups will follow exactly the same course, and therefore the [corrective action] program has to allow significant latitude to the decisionmaker in structuring the process, selecting the remedy, and setting cleanup standards appropriate to the specifics of the situation.") (citing preamble, Subpart S Proposal, 55 Fed. Reg. at 30,802).

have migrated beyond the facility boundary in concentrations that exceed background levels, the Permittee shall, within 15 calendar days of discovery, provide written notice to EPA, and all parties potentially affected by the release.

[17] In *Allied,* we identified either RCRA section 3004(v), 42 U.S.C. § 6924(v) (requiring the Agency to set standards requiring owners and operators of treatment, storage, and disposal facilities ("TSDFs") to undertake corrective action outside facility boundaries where necessary to protect human health and the environment), or the omnibus clause, RCRA section 3005(c)(3), 42 U.S.C. § 6925(c)(3) (requiring that "[e]ach 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") as possible sources of authority for a groundwater notification provision. *Allied*, 4 E.A.D. at 759. Significantly, both statutory provisions require as a condition precedent to their implementation a "determination of necessity based on protection of human health and the environment." *See id.* at 761 n.15.

CGE contends that the groundwater notification measure is "unreasonable and unnecessary for protection of human health and the environment, since the Facility is located in an area where groundwater is not used for drinking water and therefore no likely route of human exposure exists." Petition at 4. CGE also avers that the Region's use of "background levels" of hazardous constituents to trigger application of the notification provision, rather than "health-based levels," is similarly unjustified on environmental and human health grounds. *Id.* at 4–5. Finally, CGE objects that the Region has failed to provide any justification for including this provision. *Id.* at 5.[18]

In response, the Region notes that the Rio Mameyes (Mameyes River), which runs adjacent to the Facility, currently is a source of drinking water for the surrounding community and will likely become an even more important one in the future. As the Region states, "[t]he particular facts show very clearly that any contaminated groundwater migrating from the facility will reach and impact the adjacent Rio Mameyes, which has been used as a public drinking water source since 1995, and which will be used on a much more intensive basis as a drinking water source in the future." Region's Response at 7. The Region, for example, notes that pursuant to a permit issued in 1995 by the Puerto Rico Department of Natural Resources and Environment ("PRDNRE"), the Puerto Rico Aqueduct and Sewer Authority ("PRASA") draws water from the Rio Mameyes for domestic use, on an emergency basis, through a "raw water intake" located 600 meters downstream of the Facility. *See* Region's Response, app. B (Timothy Gordon Memorandum); Region's Response, app. C (Permit Number PTR–86–93). In addition, it notes that PRASA has already obtained a permit from the Army Corps of Engineers to construct a new drinking water intake facility at the same downstream location that would allow PRASA to withdraw a greater quantity of Rio Mameyes water (between 2.5 million to 5 million gallons per day). *See* Region's Response, app. D (Permit Number PTR–86–93, Information Sheet, Department of the Army Permit No. 199402941); Response to Comments at 102.[19]

[18] CGE's Reply raised several new arguments regarding the groundwater notification provision, among them that CGE's continued groundwater monitoring program, in conjunction with its delineation of the cadmium plume pursuant to the Final Permit, will provide added safeguards and a more than adequate warning of any possible cadmium plume migration to the Rio Mameyes. Similarly, CGE argues in its Reply that contested permit condition III.B.6. relating to interim corrective measures provides a more than adequate mechanism for EPA to direct CGE to notify appropriate persons of conditions which pose an immediate threat to human health. As these arguments could have been but were not raised in the Petition, we will not consider them. *See supra* note 1.

Moreover, the Region notes that recreational swimming takes place in the Rio Mameyes immediately adjacent to the Facility. *Id.*

The Region also seeks to show how specific characteristics of the Facility demonstrate a threat to public health and the environment that warrants the contested provision. First, the Region notes that in 22 of 24 quarters that monitoring took place, downgradient well (D–2) measured groundwater levels of cadmium exceeding the Maximum Contaminant Level ("MCL") under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j–26.[20] Region's Response at 7. Referring to a set of maps included in CGE's post-closure permit application that depict the Facility,

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[19] CGE states that the Region raised this "new water use information" regarding the Rio Mameyes for the first time during its Response to Comments, and that the company "believes that this information was not part of the Administrative Record at the time the Director prepared the [June 29, 1997] draft Permit * * *." Because of the information's purported late timing, CGE contends it "has not had the opportunity to further investigate this information or to comment on its validity." Petition at 4 n.1. Thus, CGE appears to suggest that the information's arrival after the date the draft permit was prepared has somehow prejudiced its ability to respond to the Region's arguments on this topic. Yet the company does not argue that the information is improperly in the administrative record.

CGE cannot reasonably protest that it has been prejudiced or surprised by the arrival of this information in the later stages of this proceeding. As plainly contemplated by the applicable regulations, the Region has merely included in the administrative record information in response to points that CGE itself raised during its comments on the draft permit concerning the purported non-use of groundwater for drinking water in the area of the Facility. *See* Response to Comments, Comment #46, at 101 (responding to CGE's assertion in Comment #46 that "[the Facility] is located in an area where ground water is not used for drinking water and therefore there is no likely route of human exposure to contamination"). Moreover, the applicable regulations clearly state that the "Regional Administrator shall base final [permit] decisions * * * on the administrative record." 40 C.F.R. § 124.18(a). The administrative record specifically includes "the response to comments * * * and any new material placed in the record under that section [§ 124.17 titled Response to Comments]." 40 C.F.R. § 124.18(b)(4). As further detailed at 40 C.F.R. § 124.17(b), "any documents cited in the response to comments shall be included in the administrative record for the final permit decision * * *." In addition, "if new points are raised or new material supplied during the comment period, EPA may document its response to those matters by adding new materials to the administrative record." *Id.* Thus, the Region appropriately included information in the administrative record responding to CGE's comments. Moreover, the appellate review process affords CGE the opportunity to question the validity of the material in the administrative record upon which the Agency relies in issuing a permit.

[20] The SDWA requires public water systems to adopt MCLs for contaminants that may have an adverse impact on human health. MCLs are to be set as close as "feasible" to a maximum level at which "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." *See* SDWA § 1412(b)(5), 42 U.S.C. § 300g–1(b)(5).

the location of groundwater monitoring wells, and groundwater elevations at different points on the property, the Region explains how the geographical configuration of waste lagoons, measured groundwater contamination at monitoring well D–2, and Rio Mameyes together pose a threat to public health and the environment. *See* Region's Response, app. H, Figs. 1–8, 1–9, and 1–10 ("Facility Maps") (RCRA Part B Permit Application (July 30, 1996)). For example, the Region notes that the lagoons, which it believes are the source of the cadmium, lie at an elevation only 10–15 feet above the river, which "has a nearly coincident boundary with the facility." Region's Response at 8; Facility Maps. The Region also indicates that the groundwater level in downgradient well D–2 "is very close to the surface level of the adjacent river, measured at a nearby point." *Id.* at 8–9. (As indicated by the Facility Maps, monitoring well D–2 is approximately 400 feet from the river, and situated at the edge of waste lagoon B, between lagoon B and the river.) Based on the above information, the Region asserts that "should the groundwater plume migrate to the facility boundary, it will reach and impact the river waters." Region's Response at 9.

The Region also offers site-specific information to refute CGE's objection that background level (rather than a health-based standard (e.g., MCL)) is an inappropriate "trigger" for groundwater notification. The Region argues that such notification is necessary because of the "coincidence of the facility boundary with the nearby Rio Mameyes" and the "movement and character of a contaminated groundwater plume." *Id.* Noting that groundwater plumes characteristically have a highly contaminated main body or "core" with lower contamination in surrounding areas, the Region states that a background level trigger will indicate that the edge of the contaminated cadmium plume has reached the river, and therefore provide notification to affected persons before the more contaminated core (identified by higher than MCL concentrations in well D–2) migrates to the Facility edge and Rio Mameyes. Region's Response at 9. Given the nature of the plumes, the Region states that using a higher health-based level would result in communities only receiving notification after a substantial surrounding area of contamination has already entered the river. Emphasizing the greater protection afforded by a background trigger vis à vis the health-based level, the Region states that the appropriate "time for notification at issue is before the groundwater plume fully passes the boundary and adjacent river." *Id.* at 10.

After reviewing the two parties' arguments, we find that the Region has not clearly erred or abused its discretion in including in the Final Permit a groundwater notification provision with a background level trigger. The Region's arguments supporting such notification as necessary to

protect public health and the environment strike us as reasonable given the Rio Mameyes' immediate proximity to the Facility, current and future drinking water uses of the Rio Mameyes downstream of the Facility, evidence of recreational swimming on the Rio Mameyes immediately adjacent to the Facility, and the history of cadmium exceedences above MCLs in well D–2, indicating a groundwater plume in close proximity to the Rio Mameyes. In sum, the totality of the circumstances as depicted by the Region provides a site-specific justification for this provision, consistent with our previous decisions. For these reasons, we deny review on this issue.

2. *Designation of Areas of Concern (AOCs)*

Condition III.A.4. of the Final Permit requires CGE to undertake corrective action at two-off-site AOCs. AOC–1 includes "sediments in the Rio Mameyes in areas potentially impacted by past releases from the Permittee's facility." AOC–2 includes sediments of Honduras Creek "in areas potentially impacted by past releases from the Permittee's facility." *See* Final Permit at III–8. The Facility is adjacent to both water bodies whose sediments are the focus of the designated AOCs. In alleging that the Facility's operations potentially impacted these sediments, the Region notes that during the Facility's electroplating operations, liquid which collected in the two waste lagoons was released via an outfall (now abandoned) into the Rio Mameyes. Region's Response at 12–13. The Region does not, however, attribute contamination of the sediments in question solely to discharges from the waste lagoons. The Region names as other possible sources of contamination of these sediments "contaminated groundwater to surface waters" as well as the Facility's concrete drainage system. *Id.* at 10. The concrete drainage system, which has operated since the Facility's inception, drains stormwater runoff from the Facility through concrete channels, discharging the runoff to both the Rio Mameyes and Honduras Creek. *See* Region's Response, app. H at 1–5 (RCRA Part B Permit Application (July 30, 1996)).

In its Petition, CGE contends that the Region's decision to impose corrective action at these AOCs is clearly erroneous and "runs afoul" of the Agency's previous policy. Petition at 9. As explained more fully below, it argues that the Region lacks legal authority to regulate the off-site AOCs under these circumstances and that the Region has failed to make the requisite human health and environmental findings that would bring the AOCs within the scope of EPA's jurisdiction.

Both parties acknowledge that prior Agency decisions have held that the omnibus provision of RCRA provides the Agency with the necessary authority to impose corrective action requirements on non-SWMUs at

TSDFs (typically referred to as AOCs). These decisions have emphasized that a condition precedent to the exercise of that authority is a fact-specific showing by the Region that corrective action with regard to a particular AOC is necessary to protect human health and the environment. *See,* e.g.*, In re Sandoz,* 4 E.A.D 75, 81 (EAB 1992); *In re Morton Int'l Corp.,* 3 E.A.D. 857, 864–65 (Adm'r 1992); *In re Amerada Hess Corp.,* 2 E.A.D. 910, 911–13 (Adm'r 1989). Furthermore, the parties recognize that where the Agency seeks to require corrective action for contamination outside facility boundaries, there must be a sufficient nexus between the off-site location and the facility. *See,* e.g.*, In re General Elec. Co. ,* 4 E.A.D. 358, 369–71 (EAB 1992) (ruling that corrective action for off-site areas is authorized only where the contamination "is migrating or has migrated" to the off-site area from the facility).[21] The Final Permit reflects the nexus concept by defining an AOC to be "an area at a facility, or an area off-site *impacted by migration of contamination from the facility,* where hazardous waste and/or hazardous constituents are present or are suspected to be present as a result of a release from the facility." Final Permit at I–12 (emphasis added). Nevertheless, CGE and the Region are in disagreement over whether the facts of this case justify, under the foregoing principles, the imposition of corrective action requirements on the AOCs in question.

CGE, seeking to challenge the Region's establishment of the necessary connection between the AOCs and the Facility, maintains that "the Director has impermissibly ignored its limited authority to regulate off-site areas by * * * attempting to include sediments in the Rio Mameyes and Honduras Creek as AOCs without making a finding on the record that contaminants of concern have *migrated* from the Facility to these alleged [AOCs]." Petition at 8. With regard to AOC–1, CGE provides general statements about the limited scope and value of the sampling data

[21] *General Electric,* which CGE cites in support of this proposition, actually concerned off-site contamination originating from a SWMU, rather than an AOC, and the parties' arguments and the Board's decision concerned RCRA section 3004(v) and 40 C.F.R. § 264.101, rather than the omnibus authority. By relying on *General Electric,* a non-AOC case, CGE appears to assume that any off-site contamination, whether from a SWMU, or otherwise an AOC, is subject to corrective action as long as there is the requisite nexus to a TSDF and corrective action is needed to protect human health and the environment. Although we have not previously decided whether the RCRA omnibus authority reaches off-site AOCs, nothing in the language of the statute itself suggests that corrective action authority could not extend to off-site AOCs, if the Region can establish the requisite nexus and the action is necessary to protect human health and the environment. *See In re Allied-Signal, Inc.,* 4 E.A.D. at 761 n.15 ("The analysis [of the adequacy of a notice provision pertaining to contamination migrating beyond the facility boundary] is no different if instead of RCRA § 3004(v) the statutory authority for including the notice provision in the permit is deemed to be the so-called omnibus clause * * *. The omnibus clause and RCRA § 3004(v) both require, as a condition precedent to implementation, a determination of necessity based on protection of 'human health and the environment'").

the Region collected on the Rio Mameyes and its sediments during the 1986 RFA. For example, CGE maintains that the Region's data "indicates that surface water and sediment conditions are within background ranges [and] below EPA drinking water standards * * * ." Petition at 9. CGE also contends that the Region's sampling in connection with AOC–1 provides little or no evidence of a threat to public health and the environment, stating that sediment samples revealed concentrations below the Agency's "approved clean-up criteria concentrations used for closure of the lagoons, and/or below EPA Region III risk-based concentrations for soil ingestion in a residential area." *Id.*

The Region, while not disputing CGE's allegations of limited surface water data indicating contamination from the Facility, challenges CGE's arguments by presenting evidence that concentrations of metal "constituents" and contamination "indicators" in a single sample of Rio Mameyes sediments exceeded background levels in several instances. For example, the Region states that a sample of Rio Mameyes sediments potentially impacted by the now-abandoned outfall leading from the waste lagoons to the river, *see supra,* revealed higher levels of zinc and nickel compared to a background river sediment sample upstream from the Facility, providing evidence of a connection between the Facility and AOC–1. In addition, the Region observes that the same sample of Rio Mameyes sediments also showed TOX (total organic halogen) and TOC (total organic carbon) concentrations that were "approximately 8 times and 5 times their respective background concentrations in a background sample." Region's Response at 13; Response to Comments at 86.

Seeking to present the TOX and TOC results as evidence of contaminant migration via groundwater from the Facility, the Region explains that TOX and TOC are used as indicators of groundwater contamination "pursuant to the interim status groundwater monitoring requirements set forth at 40 C.F.R. § 265.92(b)(3)."[22] *Id.* The Region states that under this regulation, which was applicable to the company's two hazardous waste

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[22] Section 265.92(b)(3) of Title 40 of the Code of Federal Regulations, contained in subpart F of Title 40, imposes interim status standards for owners and operators of TSDFs under RCRA. Subpart F, with certain specified exceptions, requires owners and operators of surface impoundments, landfills, and land treatment facilities to implement groundwater monitoring programs "capable of determining the facilit[ies'] impact on the quality of groundwater in the uppermost aquifer underlying the facilit[ies] * * *." 40 C.F.R. § 265.90(a). As part of a groundwater monitoring program, owners and operators are required to sample groundwater in monitoring wells for a set of "indicator parameters," including TOX and TOC, in order to determine the impact of the facilities on groundwater. 40 C.F.R. § 265.92. The monitoring system must consist of wells "upgradient" of waste management areas, which are designed to measure background groundwater quality, as well as monitoring

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lagoons, any "statistically significant increase in either [TOC or TOX] is taken as evidence of a release of a hazardous waste or hazardous constituents into the groundwater." Region's Response at 13; Response to Comments at 86. The Region argues that the elevated TOX and TOC results in the sediment sample should similarly "indicate a migration of hazardous waste or constituents from the facility" to AOC–1 via groundwater, which the Region has identified as a possible route of contamination from hazardous wastes in the two lagoons to AOC–1. Region's Response at 13–14; Response to Comments at 86.

As to AOC–2, the Region, while acknowledging that it lacks sediment or water data on Honduras Creek, notes that during the 1986 RFA it detected cadmium at a concentration 65 times higher than the health-based MCL of 10 micrograms per liter (pursuant to 40 C.F.R. § 141.11) in a single water sample taken from the concrete drainage system leading into Honduras Creek. Region's Response at 14; Response to Comments at 88. The Region, in an effort to refute CGE's arguments that the two AOCs do not pose a threat to public health and the environment, also states how contaminants in the river sediments could harm the previously mentioned downstream drinking water sources on the Rio Mameyes as well as threaten recreational users of the River and Honduras Creek "via dermal contact and accidental ingestion." Region's Response at 16–17.

After examining the two parties' arguments, we determine that the Region did not clearly err by designating the Rio Mameyes sediments as an AOC warranting further study, sampling, and characterization, as prescribed in the Final Permit's corrective action requirements.[23] The fact that zinc and nickel, both constituents of wastewater from CGE's electroplating operations (*see supra* note 3), occurred in greater than background concentrations off-site in sediments close to the facility boundary strongly suggests that the exceedances are attributable to the Facility. The higher than background concentrations of TOC and TOX in the sediment sample provide some further indication of a nexus between the Facility and AOC–1, given that TOC and TOX are used to indicate migration of hazardous waste or hazardous waste constituents into groundwater, which the Region identifies, *supra,* as a possible route of contamination of the river sediments. Collectively, this information establishes a sufficient nexus between the Facility and the alleged contamination to justify requiring further study and characterization of the off-site contamination.

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wells located "downgradient" of such areas, which are designed to "detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to the uppermost aquifer." *Id.*; 40 C.F.R. § 265.91(a).

[23] Condition III.A.5. of the Final Permit describes corrective action requirements for AOC–1. *See infra* Section II.B.5.

Further, the sampling results satisfy the Final Permit's definition of "AOC," *see supra,* by indicating contamination or potential contamination[24] of the river sediments by "hazardous waste" or "hazardous constituents." Zinc and nickel were present in the wastewater that produced the listed hazardous waste F006 generated by the Facility, *see supra* Section I, and the metals' above background concentrations in the Rio Mameyes sediments can thus be seen as indicators of the presence of F006 outside the Facility's boundaries. Also, the nickel found in the sediment sample fits the definition of "hazardous constituent" in the applicable regulations in Title 40 of the Code of Federal Regulations, since nickel is one of the constituents that formed the basis for the Agency's listing of hazardous waste F006, as described in Appendix VII of part 261 of Title 40.[25]

In addition, we find that the Region, by pointing to the proximity of the contaminated or potentially contaminated sediments to identified recreational swimming and drinking water uses of the Rio Mameyes, has made a site-specific finding of a threat to human health and the environment meriting corrective action. *See* Response to Comments at 84–88, 102.

With respect to the specific concerns CGE raised in its Petition about the sediment samples for AOC–1, we reject review because CGE has not shown why the Region's prior response, as set forth in its Response to Comments, is clearly erroneous. In its comments on the draft permit, CGE contended that the Rio Mameyes soil samples do not indicate a threat to human health or the environment because the samples did not exceed "approved clean-up criteria used for closure of the impoundments at the CGE facility" and "EPA Region III risk-based concentrations for soil ingestion." Response to Comments at 86. In its Response to Comments, the Region responded that such standards were "not relevant or applicable standards for assessing human health threat or environmental quality in fresh water sediment samples." *Id*. CGE's Petition merely parrots its original comment on this subject without explaining why the Region's response was clearly erroneous. *See* Petition at 9. As the Board has previously stated in denying permit reviews, a petitioner may not simply reiterate its previous objections to a draft permit. Rather, a petitioner must

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[24] The Final Permit's definition of "AOC" states that an AOC "shall include area(s) of potential or suspected contamination as well as actual contamination." Final Permit at I–12.

[25] Section 260.10 of Title 40 of the Code of Federal Regulations defines "hazardous waste constituent, " in relevant part, as a "constituent that caused the Administrator to list the hazardous waste in part 261, subpart D, of this chapter * * *." Appendix VII to part 261 of Title 40 identifies constituents that form the basis of the Administrator's listing of hazardous wastes.

demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous. *In re Envotech, L.P.,* 6 E.A.D. 260, 268 (EAB 1996) (quoting *In re LCP Chem.,* 4 E.A.D. 661, 664 (EAB 1993)); *see also In re Austin Powder Co.,* 6 E.A.D. 713, 721 (EAB 1997) (rejecting review of RCRA permit on particular issue because petitioner simply reiterated previous objections to a draft permit).

However, we have decided to remand to the Region its decision to designate the Honduras Creek sediments as AOC–2 and impose corrective action requirements. We are not persuaded that the Region has provided sufficient evidence on the pivotal questions of whether there is the requisite nexus between Honduras Creek sediments and the Facility (i.e., whether the contaminants have migrated or are migrating to Honduras Creek sediments from the Facility) and whether the sediments pose a threat to human health and the environment.

We note that unlike the type of information it provided in support of AOC–1, the Region never collected samples of the Honduras Creek sediments or water for the purpose of comparison with background samples, a procedure that could have provided stronger evidence of whether off-site migration occurred or is occurring. Moreover, the Region does not explain why it did not collect such samples, instead appearing to justify its selection of AOC–2 on the basis of a single sample of concrete drainage system water, and its knowledge that the concrete drainage system discharged into Honduras Creek. *See* Response to Comments at 87. This information strikes us as too tenuous given the Final Permit's definition of "AOC." According to this definition, an AOC is "an area at a facility, or an area off-site *impacted by migration of contamination from the facility,* where hazardous waste and/or hazardous constituents are present or are suspected to be present *as a result of a release from the facility."* Final Permit at I–12 (emphasis added). In addition, in its Response to Comments on the draft permit, the Region does not specify the human and environmental threats posed by Honduras Creek sediments that justify the use of corrective action. *See* Response to Comments at 84–88.

On remand the Region should both furnish information on (1) the contents of the Honduras Creek sediments in a way that will, consistent with the foregoing definition, provide greater assurance of an adequate nexus between the sediments and the Facility; and (2) the public health and/or environmental threats posed by the sediments that justify the imposition of off-site corrective action requirements. In the alternative, the Region may reissue the permit without AOC–2 so that the Region's

corrective action requirements better square with the information now in the administrative record.

3. NPDES Permitting and Designation of AOCs

CGE also maintains that AOC–1 and AOC–2, even if impacted by migration from the Facility, are nevertheless outside RCRA jurisdiction because they are attributable to outfalls that are subject to the National Pollution Discharge Elimination System ("NPDES") program,[26] and as such are exempted from definition of "solid waste." In support of this position CGE cites 40 C.F.R. § 261.4(a)(2), which excludes from the RCRA definition of "solid waste" "discharges that are point source discharges subject" to NPDES permits.[27] Petition at 8.

Noting that corrective action authority applies regardless of how far in the past a release occurred, the Region responds that the NPDES point source discharge exclusion does not apply to the AOCs in question. The Region's argument is based on its claims that the discharges that potentially impacted AOC–1 (from the abandoned outfall leading from the waste lagoons to the Rio Mameyes) and AOC–2 (from the concrete drainage system) were not subject to NPDES permitting for approximately 15 years prior to the passage of the Clean Water Act ("CWA") in 1972. In support of its position, the Region cites *Inland Steel Co. v. EPA,* 901 F.2d 1419, 1423 (7th Cir. 1990), which held that the purpose of the NPDES point source discharge exclusion was to avoid duplication between the RCRA and NPDES programs. Such duplication, maintains the Region, would not be a relevant concern during most of the Facility's period of operations, and thus the AOCs would be subject to corrective action under RCRA.

We reject CGE's NPDES point source discharge exclusion argument concerning the AOCs, and find that the NPDES point source exclusion does not apply to most of the waste discharges in the case at hand. First, it is undisputed that the wastewater discharges from the lagoons and concrete drainage system began in 1956 with the Facility's inception. (Discharges from the lagoon continued to the end of the electroplating operations in 1981, while those from the concrete drainage system continue today. *See infra* note 28.) Many of these discharges long predate the

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[26] The NPDES program, outlined in CWA section 402, 42 U.S.C. § 1342, is the principal mechanism for control and treatment of pollution from point sources under the CWA.

[27] This exclusion also appears in the statute, RCRA section 1004(27), 42 U.S.C. § 6903(27) (excluding from the definition of solid waste "industrial discharges which are point sources subject to permits under section 1342 of title 33 * * * .").

enactment of the CWA in 1972; thus, they would not be within the scope of the above regulatory exclusion, which only applies to discharges actually subject to NPDES permitting. *See In re S. D. Warren,* 3 E.A.D. 727, 729 and n.5 (Adm'r 1991) (rejecting argument that corrective action could not be required because wastewater discharge was subject to NPDES permit; much of the contamination of concern was caused by releases not authorized by NPDES permit, including releases predating the existence of the permit). The Region also identifies additional potential sources of contamination, such as contaminated groundwater to surface waters and unregulated overland stormwater run-off, *see* Region's Response at 10, 16, that similarly would not be covered by the regulatory exclusion. Therefore, the existence of these other potential routes of contamination as contributors to the AOCs would similarly support the Region's authority to impose corrective action in the instant case. *Id.*

We recognize that the Agency has enunciated a policy of not "utilizing its * * * corrective action authority to supersede or routinely reevaluate" releases permitted under the NPDES and other permitting programs. Subpart S Proposal, 55 Fed. Reg. at 30808. This clearly evinces the Agency's desire to avoid duplication of efforts between regulatory programs. However, allowing the Region to pursue corrective action against the AOCs in this instance would not undercut this policy given that most of the sources of contamination identified by the Region are not covered by the Facility's current NPDES permit. Furthermore, there is no evidence in the administrative record that the AOCs are currently being addressed under the NPDES program such that any exercise of corrective action authority would involve an actual encroachment upon another program's authority.[28] *See In re S.D. Warren,* 3 E.A.D. at 728–29 (holding that Agency policy of preventing duplication of regulatory programs is not implicated by contested corrective action since the corrective action addressed discharges that occurred before the facility was permitted under the NPDES program).

For the reasons stated above, CGE's argument the AOCs are erroneously designated on the basis of their being subject to NPDES permitting is without merit.

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[28] CGE's RCRA Part B Permit Application indicates that the Facility's sole NPDES permit still in existence only regulates stormwater discharges into the Rio Mameyes and Honduras Creek from the concrete drainage system, *see supra* Part II.2. Region's Response, app. H, at 1–5 (RCRA Part B Permit Application). Thus, the administrative record contains no indication of any NPDES permit that regulates current discharges from the retired waste lagoons. With respect to the concrete drainage system, there is no indication in the administrative record that the current NPDES permit addresses corrective action at the AOCs.

4. *Applying Conditions of SWMUs to AOCs*

The final sentence of condition III.A.4. of the Final Permit states that "[a]ll permit references to, and conditions for SWMUs shall also apply [to AOCs]."

CGE contends that applying corrective action requirements designed for SWMUs to the AOCs is clearly erroneous unless the Region establishes a factual predicate for the AOCs' inclusion in the Final Permit. In support of this argument, the company notes that RCRA only expressly requires corrective action for SWMUs and not for AOCs, and that EPA's authority to designate AOCs under the omnibus provision is limited. Petition at 10. Because CGE argues that the AOCs are not properly included in the permit, it maintains that they should not be subject to SWMU requirements.

We can easily dispose of CGE's arguments, since the company concedes that the Region can apply corrective action for SWMUs to properly designated AOCs. Petition at 10–11. As we have decided above, the Region properly designated AOC–1, and therefore, the Region can attach to it the same requirements it has imposed on SWMUs. However, the Region cannot apply these requirements to AOC–2, which it has not properly designated, as explained in Part II.B.2. above, unless and until it is properly designated.

In its Response to Comments, the Region stated that the Final Permit will require the same factual, investigative, and analytical steps for AOC–1 as well as for the SWMUs and the results of the investigative and analytical work will determine the extent, if any, of the corrective action that may be required for an AOC. Response to Comments at 24. Notably, neither in its comments nor the Petition does CGE argue that the AOCs require different investigative or analytical approaches than the SWMUs. The Region correctly observes in advocating "equal treatment" of AOCs and SWMUs that the Board has previously decided that "it is within EPA's discretion to require the same level of investigation and remediation for AOCs as SWMUs." Region's Response at 18; *see,* e.g.*, In re Amoco Oil Co.,* 4 E.A.D. 954, 962 (EAB 1993) (denying review of final permit in which Agency imposed same corrective action requirements for AOCs and SWMUs because concerns were speculative and corrective action process was flexible enough "to address any variations that might arise between AOCs and SWMUs"). We find the Region has properly exercised such discretion here.

For the foregoing reasons, the Region's decision to apply the same conditions for AOC–1 and SWMUs in the Final Permit does not constitute clear error or an abuse of discretion, and we accordingly deny review on this issue. However, the Final Permit erroneously applies "SWMU requirements" to AOC–2. The Region can only apply such requirements to AOC–2 by providing, upon remand, a proper basis for AOC–2's inclusion in the Final Permit.

5. *Inclusion of Interim Corrective Measures (ICMs) Requirements*

Condition III.B.6. of the Final Permit provides for the imposition of interim corrective measures ("ICMs") if the Region determines that a "release of hazardous waste and/or hazardous constituents poses a threat or potential threat to human health or the environment," or the Region "identifies a condition at the Facility where it would be appropriate for the Permittee to implement ICM(s) to prevent or minimize the further spread of contamination while long-term remedies at the [F]acility are pursued." Final Permit at III–10 to III–11. If the Region determines that such conditions exist, CGE is required to submit for the Region's approval an ICM plan, which analyzes the nature and threat of the contamination and the effects of delayed action, and then proposes appropriate ICMs. After approval of the ICM plan, CGE is required to submit an ICM design plan, which provides a description of the ICM selected by the Region and a monitoring program to measure the ICM's effectiveness. Upon the Region's approval of the design plan, CGE must implement the plan. Depending on the results of the monitoring program, the Region can require CGE to implement "enhancements" to the ICM "if the ICM is not sufficient to achieve its goal." Final Permit at III–10 to III–12. Unlike the implementation of final corrective action measures, which under the Final Permit require the institution of formal permit modification procedures (including notice and comment requirements), the imposition of ICMs under condition III.B.6 of the Final Permit does not require such procedures. Instead, the Final Permit's compliance schedule includes provisions for the implementation of the ICM provisions by incorporating timelines for preparation of an ICM plan and an ICM design plan. *See* Final Permit, app. III–C.I.("Compliance Schedule for Interim Corrective Measures").

ICMs play an important role in the Agency corrective action program. As the Administrator has recognized, the Agency places "strong emphasis on the use of interim measures to initiate expedited remediation where necessary at RCRA facilities." *In re B.F. Goodrich Co.,* 3 E.A.D. 483, 487 (Adm'r 1990); *see,* e.g., 1996 ANPR, 61 Fed. Reg. at 19,466 (stating that "[o]ne of EPA's overriding goals in managing the corrective action program

is to expedite risk reduction by emphasizing early implementation of interim actions to control or minimize ongoing threats to human health or the environment"). Although the parties here acknowledge the Agency's authority to require ICMs, they do not agree on the scope of that authority as it relates to particular elements of condition III.B.6. of the Final Permit.

a. The Parties' Arguments on Appropriateness of ICMs Requirements

CGE asserts that, as written, the permit condition is clearly erroneous because it fails to provide that "under certain circumstances" the Region must initiate permit modification procedures to incorporate an ICM into the Final Permit. Petition at 13. Noting that pursuant to 40 C.F.R. § 270.42, changes to a corrective action plan require notice and comment, the company argues that "since interim corrective action measures may become part of the final corrective action at the Facility," they should similarly be subject to notice and comment requirements.[29] *Id.* CGE warns that by defining so broadly its authority to mandate ICMs, the Region could circumvent notice and comment requirements in the Final Permit, and thus blunt the company's objections to corrective measures. Petition at 14.[30] CGE concludes that condition III.B.6. of the Final Permit, by failing to make ICMs available for comment and review "in any instance," deprives the company of due process of law under the U.S. Constitution. To correct this ostensible defect in the permit condition, the company requests that the Board instruct the Region to incorporate "procedural notice and comment requirements for permit modification set forth in 40 C.F.R. subpart D for approval of interim corrective measures." *Id.* at 14.

In a related argument, CGE contends that the Region has "limited" authority to impose ICMs under Agency policy and Board precedent. Citing the Administrator's decision in *In re B.F. Goodrich Co.,* 3 E.A.D 483, 487 (Adm'r 1990), CGE argues that the use of interim measures

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[29] Section 270.42 of Title 40 of the Code of Federal Regulations governs permittee-initiated changes to a permit, which are not at issue here. Section 270.41 of Title 40 governs Agency-initiated permit changes. Under the latter provision, most Agency-initiated permit modifications are subject to formal notice and comment procedures set forth at 40 C.F.R. part 124. 40 C.F.R. § 271.41. However, as explained *infra,* such procedures do not apply to the Region's incorporation of ICMs here because their incorporation would not constitute a permit "modification."

[30] Final Permit Condition III.E.8. requires that the Agency go through notice and comment procedures before selecting the final corrective action for the Facility. Final Permit at III–30.

should be based on the "immediacy and magnitude of the threat involved." Petition at 14. Under this criterion, CGE argues that condition III.B.6. of the Final Permit erroneously fails to distinguish between "truly emergency situations where a permit modification might unreasonably delay the interim corrective measure, and those non-emergency situations where any delays resulting from notice and comment periods provided for in the permit modification regulation would be acceptable." *Id.*

The Region, citing the same Board precedents as CGE, responds that condition III.B.6. involves a proper exercise of the Agency's recognized authority to issue ICMs. The Region states that the Board has accorded considerable discretion to the Agency to decide when a situation is "immediate" enough to warrant the imposition of ICMs. Region's Response at 20. Countering CGE's charge that the permit condition grants the Region unfettered power to impose ICMs, the Region asserts that numerous "limiting conditions" and "factors" in the Final Permit sufficiently circumscribe the Region's authority to impose such measures, thereby assuring that "circumstances for the invocation of interim measures are limited to situations that require prompt attention."[31] *Id.* The

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[31] The Region refers to "limiting conditions" in III.B.6. that allow the Region to initiate ICMs either (1) upon determining that "a release or potential release of * * * hazardous waste and/or hazardous conditions * * * poses a threat or potential threat to human health or the environment" or (2) upon "identif[ying] a condition at the Facility where it would be appropriate for the Permittee to implement ICMs to prevent or minimize the further spread of contamination while long-term remedies at the facility are pursued * * *." Final Permit at III–10 to III–11. Condition III.B.6. also includes nine factors which the Agency may consider in determining the need for interim measures:

> (i) time required to develop and implement a final remedy;
> (ii) actual and potential exposure of human and environmental receptors;
> (iii) actual and potential contamination of drinking water supplies and sensitive ecosystems;
> (iv) he potential for further degradation of the medium absent interim measures;
> (v) presence of hazardous waste, including hazardous constituents, in containers that may pose a threat of release;
> (vi) presence and concentration of hazardous waste, including hazardous constituents, in soils that have the potential to migrate to ground water or surface water;
> (vii) weather conditions that may affect the current levels of contamination;
> (viii) risks of fire, explosion, or potential exposure to hazardous waste, including hazardous constituents, as a result of an accident or failure of container or handling system; and
> (ix) other situations that may pose threats to human health and the environment.

Final Permit at III–11.

Region also avers that the imposition of ICMs is geared to the "unique facts of the site conditions" at the Facility, which include a contaminated groundwater plume in close proximity to a river that serves as a drinking water source. *Id.* at 19. The Region states that "the river directly adjoins the facility boundary at the point where lagoons are located, and directly downgradient from the presumed source of the already identified groundwater plume, which is to be investigated and delineated under the Permit." *Id.* The Region further notes that if the contamination reaches the point where it will directly affect the river, "there may be a compelling need to act quickly to address the plume's spread before irreparable harm occurs." In such circumstances, the Region must be able to respond quickly without having to initiate formal modification steps. Region's Response at 20. Even without access to permit modification procedures, the Region observes, CGE will have "alternative recourse" to the permit's dispute resolution provision in order to lodge any objection to any ICM requirements. *See id.* at 21; Final Permit at I–13, condition I.M.

b. *The Imposition of ICMs Requirements is Appropriate*

After examining the two parties' arguments, we find that the Region's imposition of ICM requirements through condition III.B.6. of the Final Permit is consistent with Agency policy and applicable precedent regarding the appropriate use of ICMs when threats to human health and the environment call for prompt corrective measures. Agency policy guidance states that the "Regional Administrator ["RA"] will consider the immediacy and magnitude of the threat to human health or the environment as primary factors in determining whether an interim measure(s) is required," and suggests that one factor the RA can consider in making that determination is "the time required to develop and implement a final remedy * * *." Subpart S Proposal, 55 Fed. Reg. at 30,839. In *B.F. Goodrich,* a case interpreting Agency ICM policy and cited by both parties, the Administrator rejected a petitioner's argument that ICMs imposed by the Agency were clearly erroneous because they did not address an "immediate" or imminent threat. Instead, recalling the language of Subpart S regarding ICMs, the Administrator found that the "requisite degree of immediacy that justifies such measures depends in part on the amount of time needed to establish and implement permanent corrective action measures." The Administrator upheld the contested ICMs, finding that the Region had properly considered the magnitude and immediacy of the threat in deciding whether to require interim measures. *B.F. Goodrich,* 3 E.A.D. at 487.

Consistent with the holding in *B.F. Goodrich* that the Agency has considerable discretion to decide when ICMs are warranted, we find nothing in condition III.B.6., as written, that will prevent the Region from making an appropriate judgment about whether ICMs are justified. As further evidence that this permit condition does not depart from Agency policy on ICMs, we note that the "limiting language" and "factors" that the Region states will guide its decision to employ ICMs, *supra* note 31, are taken verbatim from the factors that Subpart S recommends the Regional Director consider in deciding whether to implement ICMs. *See* 55 Fed. Reg. at 30,839. Additionally, we note that the Final Permit also requires an analysis of the effects of delayed action as one component of an ICM design plan. Final Permit at III–10 to III–11.

The ICM provision here is a general one,[32] and it remains to be seen whether the Region will in fact make a determination that an ICM plan is even required. Thus, the specific concerns that CGE has articulated are wholly speculative. There simply is no indication that if an ICM is imposed, the Region would act inappropriately as urged by GE. To the contrary, there are assurances that the Region will, as it asserts, confine its use of ICMs to situations calling for "prompt action," and not use such measures as a covert way to avoid formal permit modification procedures, which Final Permit condition III.E.8. requires that the Region institute when imposing final corrective action measures.

First, particular characteristics of this site—an identified groundwater plume and the property's direct proximity to a known drinking water source—give credence to the Region's statements that the need for using ICMs would arise in situations, "such as the groundwater plume directly approaching the river," that by nature require prompt and immediate attention. *See* Region's Response at 19–20. Second, in its Response to Comments, the Region states that "if based on the Corrective Measures Study, an ICM already in progress, or previously implemented, is determined to constitute the Corrective Measure for final site clean-up, this determination would then require a permit modification pursuant to 40 C.F.R. § 270.41 and § 270.42, as required under Section III.E.8. of the Permit." We adopt this assurance as an authoritative reading of the Final Permit that is binding on the Region. *See,* e.g., *In re Amoco Oil Co.,* 4 E.A.D. 954, 981 (EAB 1993); *In re Austin Powder Co.,* 6 E.A.D. 713, 717

[32] We find nothing erroneous in the inclusion of such a general provision under the circumstances of this case. *See In re General Motors Corp., Delco Moraine Div.,* 4 E.A.D. 334, 347 (EAB 1992) (rejecting challenge to ICM on the grounds that the provision exceeded the Region's authority; permit made clear no such measures may be required unless the Region determines they are necessary to protect human health or the environment; provision remanded on other grounds).

(EAB 1997); *see also* Region's Response to Comments at 94. In light of this and other safeguards in the Final Permit that will guard against improper use of the Region's ICM authority, CGE's doubts about the Region's good faith implementation of this permit provision do not provide a basis for the Board's review of the Final Permit. As we have previously held, "the role of the Board is to determine whether the permit was appropriately issued. The Board has no oversight responsibility for the implementation of a validly issued permit." *In re General Electric Co.,* 4 E.A.D. 358, 370 (EAB 1992).

c. *Notice and Comment Permit Modification Procedures are Not Required*

Furthermore, we find that the Region is not legally required to institute formal permit modification, including notice and comment requirements, when imposing ICMs in the Final Permit. In *In re General Electric Co.,* 4 E.A.D. 615, 624–25 n.9 (EAB 1993), we held that a revision or incorporation by the Region of an interim submission required under the original terms of a permit will not constitute a modification of the permit subject to the formal modification procedures at 40 C.F.R. § 270.41 and 40 C.F.R. part 124. *Accord In re Allied-Signal, Inc.,* 4 E.A.D. at 753. In *General Electric,* among those interim submissions we found did not warrant formal modification procedures were submissions for "interim measures" addressing imminent threats similar to the submissions CGE may be required to make in implementing ICMs. In *General Electric,* we stated that a revision or incorporation of an interim submission does not modify a permit, but rather fulfills a permit's preexisting terms, because the submission of such information is contemplated within the permit itself. *General Electric,* 4 E.A.D. at 624. Similarly, the Region's approval and revision of CGE's submissions under condition III.B.6. (the "ICM plan" and "ICM design plan," *see supra*), would simply fulfill the terms of the original permit and would therefore not require formal modification procedures. *Id.* As in *General Electric,* the Final Permit here contains a provision by which "plans, reports, and schedules" required by the permit are automatically incorporated into the Final Permit upon their approval by the Region. *See* Final Permit at I–2, Permit Condition I.D.[33] Thus, as we held in *General Electric,* the change in the permit to incorporate the new

[33] Final Permit Condition I.D. provides as follows:

> Unless otherwise specified, all plans, reports and schedules required by the terms of this permit are incorporated into this permit, upon approval by EPA. Any noncompliance with such approved studies, reports or schedules shall constitute a violation of this permit.

plans occurs automatically through operation of the permit itself and thus does not constitute the kind of "new information" contemplated in section 270.41 necessary to trigger application of notice and comment procedures under 40 C.F.R. part 124.[34] *General Electric,* 4 E.A.D. at 624; *see also In re General Electric Co.,* 4 E.A.D. 358, 366 & n.7 (EAB 1992) (holding that the rationale stated in *In re W.R. Grace & Co.,* 3 E.A.D. 538, 539 (Adm'r 1991) that Regional revision of interim submissions does not conflict with Agency's permit modification rules "applies with equal force to interim submittals relating to interim measures").[35]

d. *The Final Permit Provides Sufficient Due Process*

Finally, we find that the dispute resolution provision in the Final Permit provides the company sufficient due process in the event it disputes an ICM. In fact, the dispute resolution procedures described in Final Permit condition I.M. (applying to all "disputes or differences of opinion [that] may arise in connection with [the Final Permit]") satisfy all the due process requirements we prescribed in *General Electric* for situations involving contested interim submissions. *See General Electric,* 4 E.A.D. at 629–40.

In *General Electric, supra,* we determined that the Region's incorporation of revised interim submissions as an enforceable part of permit did entitle the permittee to due process protection under the Fifth Amendment of the U.S. Constitution. In particular, due process required giving the permittee notice and an opportunity for a "hearing," i.e., an opportunity to dispute the provision. 4 E.A.D. at 627 (citing *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Cleveland Board of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985)). In considering what particular

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[34] Section 270.41 of Title 40 of the Code of Federal Regulations specifies that "information" can be a cause for modification of a permit if the Regional Director or State Administrator receives information that "was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance." 40 C.F.R. § 270.41(a)(2).

[35] We recognize that the ICM plans in the Final Permit are more general than the interim submissions at issue in *General Electric, supra*, and that the requirement to submit the ICM plans is contingent upon the Region's determination that they are appropriate. *See* Final Permit at III–10 to III–11. Nevertheless, the reasoning we adopted in *General Electric, supra,* still applies here: the "ICM plan" and "ICM design plan" that CGE may be required to submit under the Final Permit would not yield "new information" outside the contemplation of the Permit, therefore requiring notice and comment procedures; rather, the plans would fulfill provisions in the original permit designed to "make obligations that are already in the permit more specific." *General Electric,* 4 E.A.D. at 624.

process was due in that case, we found that procedures in which the permittee would have the opportunity to meet with Agency officials, submit written comments to the regional decisionmaker, and receive a response from the Region stating the reasons for its final decision would satisfy due process.[36]

The dispute resolution provision in the Final Permit contains all the necessary features we deemed sufficient in *General Electric* to protect the due process rights of permittees required to comply with the terms of a revised interim submission under a final permit. The dispute resolution provision here would enable CGE to meet informally with Regional staff, to submit a written statement explaining the points of disagreement with the terms of any ICM, and to receive a final written decision by the Region setting forth its reasons for the decision. Moreover, the provision contains two features that we recommended as a matter of sound policy in *General Electric:* first, the provision is included in the Final Permit itself, and second, it provides that the Region's decision and statement of reasons will be made by the same official who issued the Final Permit.[37, 38] *Id.*

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[36] In deciding which particular procedural safeguards were necessary to protect the permittee's due process rights in *General Electric,* we followed the analysis developed by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319 (1976). *Mathews v. Eldridge* offered the following three-part test for determining what process is due in a particular context:

> (1) the private interest that will be affected by the official action;
>
> (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

General Electric, 4 E.A.D. at 632 (citing *Mathews v. Eldridge,* 424 U.S. at 335).

[37] According to the Final Permit's dispute resolution provision, the Director, Division of Environmental Protection and Planning, EPA Region II, shall make final decision in writing on the dispute in question. Final Permit at I–14. This is the same official who issued the Final Permit. *See* Final Permit at 3.

[38] In *General Electric,* we recognized due process "may require the Regions to offer more procedural protection than is afforded by the dispute resolution procedures" in cases "involving extraordinarily high financial stakes." *General Electric,* 4 E.A.D. at 633. Accordingly, we recognize that although the dispute resolution provision in the Final Permit will offer sufficient due process safeguards in most circumstances, these safeguards may not be sufficient in exceptional circumstances. Since any particular instance in which the due process protections may be insufficient is purely speculative, we decline to grant review of the Final Permit on this basis.

For the foregoing reasons, the Region has committed no clear error, abuse of discretion, or denial of due process by including in the Final Permit a provision for imposing ICMs that does not provide for formal permit modification procedures, including notice and comment requirements.

6. *Inclusion of 6 SWMUs*

Conditions III.A.3. and III.A.5. of the Final Permit require CGE to undertake a Phase I RCRA Facility Investigation ("RFI")[39] for eight SWMUs and two AOCs [40] identified as a result of the 1986 RFA. In its Petition, CGE challenges the Region's RFI requirement for six of the SWMUs. These include: SWMU #2 (Lagoon Waste Pile); SWMU #4 (Electroplating Area Sump); SWMU #6 (Parking Lot Sump); SWMU #10 (Parking Lot Waste Pile); SWMU #11; (Septic Tanks); and SWMU #13 (Pump House Area Sump). Five of these SWMUs—#2, #4, #6, #10, and #13—were identified in the RFA to be associated with the CGE's electroplating operations. SWMU #11 received sanitary wastes from the Facility.[41] RFA at 4–8. Following recommendations contained in the RFA, the Final Permit, under the Phase I RFI, requires CGE to investigate surface and subsurface soils at the SWMUs. Final Permit at III–8.

CGE contends that the Region's imposition of Phase I RFI requirements on the six SWMUs is clearly erroneous and beyond its authority because of the low or nonexistent risks the units pose to human health and the environment. Petition at 17, 22. In support of this position, the company notes the Region has disregarded the previous remediation it

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[39] The RFI is the step of the corrective action process which follows the RFA. An RFI is undertaken when the RFA identifies actual or potential releases from an SWMU. The purpose of an RFI is to assess the identified releases by characterizing their nature, extent, and rate of migration. *See In re American Cyanamid Co.,* 3 E.A.D. 648, 658 (Adm'r 1991); Subpart S Proposal, 55 Fed. Reg. at 30,801–02; U.S. EPA, Office of Solid Waste and Emergency Response, *National RCRA Corrective Action Strategy* at 9–15 (1986). The Region inserted the "Phase I RFI" in the Final Permit, replacing language in the draft permit that simply required CGE to perform an "RFI" on the 8 SWMUs. A "Phase I" RFI differs from a full RFI in the extent and degree of information required. The purpose of the "Phase I" RFI is to confirm the existence of releases that could potentially have an impact on human health and the environment. *See* Response to Comments at 91–92; 1996 ANPR, 61 Fed. Reg. at 19,443 (describing "Phase I" RFIs). Under the Final Permit, a full RFI would only be conducted if such releases are confirmed at the "Phase I" RFI. Final Permit at III–3.

[40] The Region's authority to impose corrective action requirements on these AOCs has been previously discussed in *supra* Parts II.B.2. and II.B.3.

[41] These SWMUs are depicted in a "PPD (Precision Protective Devices, Inc.) Facility Layout and Wastewater Flow" map included in the Final Permit. Final Permit at III–7.

performed at most of the SWMUs in question, in particular work carried out under a "SWMUs Clean-up Workplan" initiated by the company in 1989 subsequent to the RFA. *Id.;* Region's Response, app. H at 1–2 (RCRA Part B Permit Application). The company asserts that closure activities it conducted at SWMUs #2, #4, #6, and #13 resulted in concentrations of contaminants identified in the RFA below the "clean-closure" criteria applied to the waste lagoons under Module IV of the Final Permit. CGE further claims that concentrations of various hazardous constituents at the SWMUs were measured during the RFA and after closure to be below the Agency's "Region III residential risk based criteria." Petition at 14–22.

In addition, CGE maintains the RFA mistakenly identified two of the SWMUs (#10 and #11) as being "SWMUs." The company, referring to Figure 1 of the January 29, 1985 report entitled "Sampling and Analysis of Soils in Plant Area Soils," observes that the figure presents SWMU #10 (Parking Lot Waste Pile) as a "sampling area, not a disposal area." Petition at 20; *see* Region's Response, app. K, Fig. 1 (Sampling and Analysis of Plant Area Soils, Precision Protective Devices, Inc. (Jan. 29, 1985)). Thus, CGE contends that since the "SWMU" was not involved in "disposal," it was not properly designated as a "SWMU." *Id.* The company further asserts that SWMU #11 (Septic Tanks) was not properly identified as a "SWMU" because "the septic tanks were only connected to sanitary facilities at the plant; there is no indication that these tanks ever received hazardous wastes." Petition at 21.

Claiming that the SWMUs in question do not merit further investigation as potential threats to human health and the environment, CGE requests the Board to direct the Regional Director to delete the six SWMUs from the permit and place them instead on the Final Permit's "no further action" list. Petition at 14–22.

In its earlier Response to Comments, the Region responded to virtually identical assertions by the company. At that time, the Region acknowledged the extent of CGE's previous remediation work, but explained that CGE's "1989 SWMUs Clean-up Work Plan" was never approved by EPA, nor has the Permittee ever submitted to EPA a complete and acceptable workplan for a full investigation, and clean-up if warranted, of all SWMUs at the facility." Response to Comments at 45. The Region also stated that the "prior data [on CGE's remediation work it submitted to the Region] was not analyzed with appropriate EPA methodologies, nor supported with adequate quality control/quality assurance data, nor validated according to EPA requirements." *Id.* at 68. In addition the Region noted that the remediation work that the company performed on three of the electroplating sump SWMUs (#4, #6, and

#13) was not comprehensive because it did not include characterization of "the subsurface soils underlying these structures * * * for possible groundwater impacts." *Id.* at 69.

In its Response to Comments, the Region pointed out that there were exceedances of the Agency's "soil screening levels" for possible impacts to groundwater at all of the contested SWMUs. For example, the RFA sampling revealed exceedances of such soil screening levels for cadmium and chromium at SWMU #2; for cadmium and chromium at SWMU #10; and for cadmium at SWMU #11. The exceedances occurred on almost all soil samples taken at these SWMUs. Response to Comments at 68–71. Such exceedances also occurred in "bore hole" samples that CGE took of soils underneath the SWMUs where the company had performed previous remediation work. The sampling, which occurred along bore intervals, revealed exceedances for chromium, with the highest levels of chromium found at the deepest levels. *Id; see also* Region's Response, app. H, Tbl. 9–2 (RCRA Part B Permit Application). Based on these exceedances, the Region explained that it had "determined" that the SWMUs could be "acting as sources for on-going groundwater contamination, and need to be more fully characterized * * *." Response to Comments at 68–71.

In its Response to Comments, the Region also countered CGE's assertions that SWMUs #10 and #11 were not properly included in the Final Permit. Although the Region agreed that "Figure 1" (cited by CGE, *supra,* in support of its claim that SWMU #11 (Parking Lot Waste Pile) was a sampling area) indeed bore the title "Sampling and Analysis of Plant Area Soils," the Region observed that "Figure 1" itself "showed two areas south and west of the parking lot, labeled, 'Sludge Disposal Sampling' areas." Response to Comments at 79; *see* Region's Response, app. K, fig. 1 (Sampling and Analysis of Plant Area Soils, Precision Protective Devices, Inc. (Jan. 29, 1985)). The Region also refuted CGE's contention that SWMU #11 (Septic Tanks) did not receive any hazardous wastes, noting that an RFA sludge sample taken from one of the septic tanks revealed elevated levels of cadmium and chromium, which in the case of cadmium (8 mg/kg) exceeded the Agency's soil screening level for possible groundwater impacts (6 mg/kg). Response to Comments at 71. Based on the results, concluded the Region, "hazardous wastes or hazardous constituents were likely disposed in the septic tank at some point."

In its Petition, CGE merely restates its earlier objection to the Permit without explaining why any of the Region's above responses were clearly erroneous. Thus, CGE provides no substantive response on the Region's comments regarding deficiencies in the company's previous

remediation work, reported exceedances of soil screening criteria at the SWMUs, and the proper inclusion of the contested areas as SWMUs.

CGE's failure to respond is especially significant with respect to the Region's reports of exceedances of soil screening levels for possible groundwater impacts. The company's silence on this matter strikes us as consequential because of the history of groundwater contamination at the site as well as the strong emphasis the RFI places on identifying and addressing the migration of contaminants in groundwater. The Region's contentions with respect to these screening levels form the whole underpinning for the RFI. Rather than challenge the validity of these criteria, CGE, in its appeal briefs, simply resurrects its earlier comments that since the SWMU sampling, with few exceptions, did not exceed residential risk-based and clean-closure criteria, the SWMUs do not pose risks to human health and the environment warranting further investigation.

The Region, in its Response, also disputes the company's reliance on the residential risk-based and clean-closure criteria. It maintains that the residential-risk based concentrations are not "an appropriate measure" at the SWMUs because "the residential concentration levels are for the soil ingestion pathway for human health impacts from contamination, whereas at the CGE facility the most likely pathway for human health impacts from contamination is from groundwater." Region's Response at 22. The Region also discounts the use in this context of "clean-closure criteria"[42] because "[these] criteria * * * were never intended for site-wide use or as a measure of whether or not there should be investigation to determine if a release or releases may have occurred. The context for a closure plan is completely different in that the [lagoons] are subject to a minimum of 3 years of groundwater monitoring, and, if warranted, to up to 30 years of post-closure monitoring." *Id.* at 22–23. The explanation that the Region provides in support of using soil screening criteria as a measure of human health and environmental risk strikes us as reasonable and grounded in the specific circumstances of the site. It warrants on CGE's part a site-specific argument in favor of the residential risk-based and clean-closure criteria the company favors, which CGE here failed to provide.

As we have stated before in the context of permit reviews, a petitioner may not simply reiterate its previous objections to a draft permit. The petitioner must demonstrate why the Region's response to those objections is clearly erroneous. Because CGE, in its Petition, has simply repeated its earlier argument opposing investigation of the above SWMUs

[42] The Final Permit applies the clean-closure criteria to the two waste lagoons in Module IV of the Final Permit.

through an RFI without showing how the Region's responses to those arguments were clearly erroneous, we deny review on this issue. *In re Envotech,* LCP, 6 E.A.D. 260, 268 (EAB 1996) (quoting *In re LCP Chem.,* 4 E.A.D. 661, 664 (EAB 1993)); *see also In re Austin Powder Co.,* 6 E.A.D. 713, 721 (EAB 1997) (rejecting review of RCRA permit on particular issue because petitioner simply reiterated previous objections to a draft permit).

III. *CONCLUSION*

The Final Permit is remanded, and the Region is directed to reopen the permit proceedings for the purpose of establishing a proper basis for the inclusion of A0C–2 as described above, or in the alternative, to reissue the Permit to CGE without AOC–2.[43] The Region must accept and respond to public comment on its decision.

Any party who participates in the remand process on this issue and is not satisfied with the Region's decision on remand may file an appeal (limited to this issue) with the Board pursuant to 40 C.F.R. § 124.19. On the other issues raised by CGE, review is denied for the reasons set forth above.

So ordered.

[43] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of 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 to be addressed on remand. *See In re Ash Grove Cement Co.,* 7 E.A.D. 387, 433 (EAB 1997).