# IN THE MATTER OF GENERAL ELECTRIC COMPANY

RCRA Appeal No. 91–7

***REMAND ORDER***

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Decided April 13, 1993

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## Syllabus

The Environmental Appeals Board granted review of a petition filed by General Electric Company challenging the corrective action portion of a RCRA permit issued by EPA Region I. All of the issues in the case except one were disposed of in an earlier order. The one issue remaining for disposition relates to the Region's authority under the permit to revise reports and proposals submitted by GE in accordance with the permit. Under the permit, GE is required to determine the extent of contamination at the facility, the best methods to clean up such contamination, and the best way to carry out certain interim measures for addressing imminent threats to human health and the environment from the contamination. To accomplish these goals, the permit requires GE to submit proposals for completing a RCRA Facility Investigation (RFI), a Corrective Measures Study (CMS), and a number of interim measures to deal with imminent threats. When GE has completed the RFI, the CMS, and the interim measures, the permit also requires GE to prepare reports summarizing the work that has been done and if appropriate recommending that more work be done. The proposals and reports to be submitted by GE ("interim submissions") substantially define GE's obligations under the original permit. Such interim submissions are subject to the Region's approval, and the Region is authorized under the permit to revise them or to require GE to revise them. By revising GE's interim measures, the Region can require GE to do more work than GE thought was necessary to fulfill the requirements of the original permit. Once the Region has approved an interim submission, any work requirements contained therein become enforceable obligations under the permit.

GE argues that a revision by the Region of one of GE's interim submissions will constitute a modification of the permit and is therefore subject to the formal modification procedures at 40 CFR §270.41 and 40 CFR Part 124. GE also argues that, even if a revision of an interim submission does not constitute a permit modification for purposes of Section 270.41, such a revision does constitute a deprivation of property within the meaning of the Constitutional due process clause. GE argues, therefore, that it must be given notice and an opportunity for a hearing before the deprivation may be accomplished.

Held: A revision by the Region of an interim submission will not constitute a modification of the permit subject to the formal modification procedures at 40 CFR §270.41 and 40 CFR Part 124. However, before the Region approves the revised interim submission, it must give GE the opportunity for a hearing, and the procedures

for such a hearing should be set out in GE's permit. The hearing procedures should be patterned after the dispute resolution provision described by the Region at oral argument but modified as necessary to conform with this decision. Thus, the dispute resolution provision to be inserted into GE's permit should provide that, if GE and the Regional permitting staff cannot resolve the dispute, GE will have the right to submit written arguments and evidence to the person in the Region who has authority to make the final permit decision for the Region, either the Regional Administrator or the person to whom the Regional Administrator has delegated authority to make such decisions. The dispute resolution provision, however, need not grant GE the right to make an oral presentation to the final decisionmaker.

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

***Opinion of the Board by Judge Reich:***

On March 13, 1992, the Environmental Appeals Board granted review of a petition filed by General Electric Company challenging the corrective action portion of a permit issued by EPA Region I under the Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901–6992k. The permit, which was issued on February 8, 1991, is for GE's manufacturing facility in Pittsfield, Massachusetts.[1] On November 6, 1992, the Board issued a Remand Order remanding certain issues raised by GE, dismissing other issues, and reserving judgment on one issue. The issue on which the Board reserved judgment relates to the absence in the permit of a specified procedure for handling disputes between GE and the Region over the Region's revisions of proposals and reports ("interim submissions") submitted by GE in accordance with the permit. For the reasons set forth below, the Board is remanding this issue to the Regional Administrator with instructions to change the language of the subject permit to add a procedure for resolving disputes over revisions of interim submissions.

## I. *BACKGROUND*

The 1984 HSWA amendments added Section 3004(u) to RCRA, providing that any person seeking a permit under Section 3005(c) of RCRA for a treatment, storage, or disposal facility after November 8, 1984, must perform any "corrective action" necessary to clean up releases of hazardous wastes or hazardous constituents from any solid waste management unit (SWMU) at the facility. This requirement is implemented in the regulations at 40 CFR § 264.101.

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

A permittee's corrective action work at a facility typically takes place in three stages. In the first stage, the permittee performs a RCRA Facility Investigation (RFI), the purpose of which is to determine the extent and nature of any releases from SWMUs at the facility. In the second stage, the permittee performs a Corrective Measures Study (CMS), the purpose of which is to investigate potential corrective measures for cleaning up those releases. On the basis of that investigation, corrective measures are selected by the Region and incorporated into the permit through the formal modification procedures at 40 CFR § 270.41 and 40 C.F.R. Part 124. The third and final stage of corrective action is implementation of the corrective measures selected by the Region. In addition, when circumstances warrant, the permittee is required to take corrective measures before the RFI and CMS are completed to address any imminent hazards to human health or the environment. Such corrective measures are called interim measures.

When the corrective action necessary to address releases at the site cannot be completed prior to the issuance of a permit, the permit contains a schedule of compliance, which dictates the corrective action tasks that need to be done and the time periods in which those tasks must be completed.[2] Frequently, at the time the permit is issued, the extent and nature of the contamination at the facility and the most effective ways of cleaning up the contamination are not fully known. As a result, when the Agency issues the permit, it does not have sufficient information to include a detailed schedule of compliance for the RFI or CMS to be performed at the site. For this reason, the obligations in the schedule of compliance relating to the RFI and CMS are written in general terms, with the permit providing that the details of those obligations will be filled in later as more information about the site becomes available. Once such information becomes available, the permittee is required to propose plans for carrying out the various steps of the RFI and CMS. The permittee must also submit reports on the work it has completed. The plans and reports submitted by the permittee must be approved by the Regional Administrator, who is authorized to revise or require the permittee to revise them. Once the Regional Administrator approves these interim submissions, they become enforceable obligations of the permit. Thus, the permittee's interim submissions are used to flesh out the more general obligations in the original permit.

[2] *See* RCRA Section 3004(u), 42 U.S.C. 6924 ("Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) * * *.")

The permit issued to GE follows this typical pattern. It sets up an extended schedule of compliance according to which GE is required to submit proposals and reports to the Region. First, GE's permit requires submission of a detailed proposal for a RCRA Facility Investigation to investigate releases from 106 identified SWMUs and of the sediments, surface water, and 100-year floodplain of the Housatonic River. Final Permit, Exhibit A to GE's Petition for Review, at 14–81. Under the permit, GE's RFI proposal is subject to review and approval by the Region, and the Region is authorized to revise or require revision of the proposal. Final Permit, at 86–87. Thus, by revising the proposal, the Region could, for example, require GE to dig more groundwater detection wells to determine the extent of a particular release than GE thought necessary. After GE has performed the investigation requirements in the approved RFI plan, it must submit an RFI report. The report is also subject to review and approval by the Region, and the Region is authorized to revise or require revision of the report. If the report concludes that further investigation is necessary and if the Region approves the report, the permittee must implement such further investigation according to the schedules contained in the report. Final Permit, at 97.

As part of the RFI, GE is required by the permit to submit a proposal for a Health and Environmental Assessment (HEA), identifying the human populations and/or environmental systems that may be exposed to hazardous waste and/or hazardous constituents released at the facility. Final Permit, at 73. Upon completion of the HEA, GE is required to submit an HEA Report, which is separate from the RFI report. The HEA Proposal and the HEA Report are both subject to review and approval by the Region, and the Region is authorized to revise or require revision of either of them. Final Permit, at 89.

At the time GE submits the RFI Report, GE is also required to submit a Media Protection Standards Proposal, containing at a minimum, proposed media protection standards (clean-up standards) for all releases identified during the RFI. The Region will then either approve or disapprove the proposal. If the Region disapproves the proposal, it is authorized to revise or require revision of the media protection standards proposed by GE. Final Permit, at 103–04. On the basis of the media protection standards approved by the Region, GE will then submit a Corrective Measures Study Proposal. The purpose of the Corrective Measures Study Proposal is to identify, and justify the selection of, the corrective measures it will consider

as potential methods of achieving the approved Media Protection Standards. Final Permit, 104–05. The Corrective Measures Study Proposal is subject to review and approval by the Region, and the Region is authorized to revise or require revision of the proposal. Thus, by revising the Corrective Measures Study Proposal, the Region could require GE to investigate the possibility of using a corrective measure not identified in GE's proposal. Once the Corrective Measures Study has been approved by the Region and performed by GE, the permit requires GE to submit a Corrective Measures Study Report. Among other things, the report must include an assessment of which corrective measure alternatives could be pursued to meet the Media Protection Standards. The Report is subject to review and approval by the Region, and the Region is authorized to revise or require revision of the report. On the basis of the report and other factors, the Region will select the corrective measures necessary to remedy the releases at the facility.

GE's permit requires it to carry out certain interim measures. Final Permit, at 108. It also requires GE to submit a proposal detailing the methodology and procedures GE will follow to carry out these interim measures. *Id.*[3] This proposal is also subject to the review and approval of the Region, and the Region is authorized to revise or require revision of the proposal. For example, the Region could require GE to use a different methodology to carry out a particular interim measure. Final Permit, at 112. Once the Region approves the proposal, GE will be required to carry out the interim measures using the methodologies and procedures specified in the approved plan. After that, GE will be required to submit an Interim Measures Report, which must summarize all work performed to carry out the interim measures and must include an evaluation of the effectiveness of the interim measures performed and the need for further work. If the Interim Measures Report concludes that further work is necessary, the report must include a proposed scope of further work, appropriate protocols, and schedules. The Interim Measures Report is subject to review and approval by the Region, and the Region is authorized to revise or require revision of the report. Thus, by revising the report, the Region might require GE to perform supplemental work to correct a particular problem that was not solved by the original interim measure. Final Permit, at 112–13.[4]

[3] Although the Region has agreed to delete some of the interim measures specified in the permit and the Board has remanded others to the Region for reconsideration, several of the interim measures originally specified in the permit remain.

[4] This case is to be distinguished from *General Motors Corporation, Delco Moraine Division (North & South Plants),* RCRA Appeal Nos. 90–24, 90–25 (EAB, November

Continued

GE argues that revisions of its interim submissions constitute modifications of the permit and are therefore subject to the formal modification procedures at 40 CFR §270.41 and 40 CFR Part 124. A permit modification under those procedures can be appealed to the Environmental Appeals Board under 40 CFR § 124.19(a) and then to the U.S. Court of Appeals under RCRA Section 7006(b), 42 U.S.C. §6976. GE also argues that, even if a revision of an interim submission does not constitute a permit modification for purposes of Section 270.41, such a revision does constitute a deprivation of property within the meaning of the Constitutional due process clause. GE argues, therefore, that it must be given notice and an opportunity for a hearing before the deprivation may be accomplished. GE's challenge does not extend to the Region's ultimate selection of the corrective remedies to be performed at the site, since those corrective remedies become part of the permit through the formal permit modification procedures at 40 CFR §270.41 and 40 CFR Part 124.

Permit conditions like the ones challenged here were considered by the Agency in *In re W.R. Grace & Company,* RCRA Appeal No. 89–28 (Adm'r, March 25, 1991). In that case, the permittee argued that revisions of interim submissions by the Regional Administrator constituted permit modifications and must therefore conform to the formal modification procedures at 40 CFR §§270.41 & 124.5. Under those procedures, the modified portion of the permit is treated like a draft permit and is subject to the procedures in 40 CFR Part 124 for issuing draft permits. 40 CFR §124.5(c). If the Regional Administrator proceeds with a modification over the objections of the permittee, the permittee may appeal the result to the Environmendal Appeals Board under 40 CFR §124.19(a), and it may appeal the Board's decision to the Court of Appeals under RCRA §7006(b), 42 U.S.C. §6976(b). The Administrator, however, rejected the permittee's argument that the Agency is constrained to follow

6, 1992). The corrective action permit at issue in that case contained a provision that authorized the Regional Administrator to revise the permit's schedule of compliance to require the permittee to perform interim measures whenever the Regional Administrator determined that a release posed a threat to human health and the environment. The permit provided that such revisions to the schedule of compliance were to be accomplished through either the formal modification procedures at 40 CFR §270.41 or an abbreviated modification procedure described in the permit. The Board directed the Region to remove the abbreviated procedure from the permit because it had not been adopted by regulation and to provide that Agency-initiated modifications to incorporate interim measures must proceed according to the existing modification procedures in 40 CFR §270.41. *Id.* at 17. The holding in *General Motors,* however, has no bearing on this case because here, the interim measures were specified in the original schedule of compliance, while in *General Motors* the schedule of compliance did not specify any interim measures.

these formal permit modification rules in revising an interim submission. He concluded that the "Regional revision of interim submissions does not conflict with the Agency's permit modification rules because such submissions are not part of the permit at the time of the Region's review and revision." *Grace*, RCRA Appeal No. 89–28, at 3.

The permittee in *Grace* also argued that by not subjecting Regional revisions of interim submissions to formal modification procedures, the permit deprived the permittee of its property without due process of law. The Administrator also rejected this argument, observing that:

> Although Grace invokes the constitutional due process clause, the permit on its face provides an opportunity for adequate process because Grace will be able to make its views known through its initial submissions as well as any subsequent communications with the Region, and it should receive a reasoned response to those views from the Region.

*Id.* at 3 (footnotes omitted).[5]

On November 3, 1992, the Board granted review and scheduled oral argument in a case involving the same issues decided in the *Grace* case. *In re Allied-Signal, Inc. (Metropolis, Illinois)*, RCRA Appeal No. 92–1 (EAB, November 3, 1992)(Order Granting Review and Scheduling Oral Argument).[6] In the order granting review, the Board noted that "[a]lthough *Grace* is presumptively conclusive of the permit modification and due process issues raised here by Allied, the Environmental Appeals Board is nevertheless concerned that *Grace* may require further explication and, also, that Allied's petition may raise related but distinguishable issues from those that were decided by *Grace*." *Id.* at 3.

[5]The Administrator's *Grace* decision was appealed to the U.S. Court of Appeals for the First Circuit. *W.R. Grace & Co.—Conn.* v. *U.S. E.P.A.*, 959 F.2d 360 (1st Cir. 1992). On appeal, the Court declined to hear the case, ruling that it was not ripe for disposition. The Court concluded that an appeal of the contested permit provisions would not be ripe until an actual dispute arose over a Regional revision of a particular interim submission. *Id.* at 365–67.

[6]The questions designated for oral argument related to the Region's legal or policy basis for treating revisions of interim submissions differently than the selection of the corrective measures with respect to the Section 270.41 modification procedures, the effect of the *Grace* decision on a permittee's statutory right to judicial review of permit modifications, and the adequacy for due process purposes of a proposed hearing procedure for challenges to Regional revisions to interim submissions.

On November 6, 1992, the Environmental Appeals Board issued an order disposing of all of the issues raised in GE's petition, except the issue of whether GE's permit should contain a dispute resolution procedure for resolving disagreements between GE and the Region over Regional revisions of interim submissions. With respect to this issue, the Board reserved judgment because the Board had granted review of the same issue in the *Allied-Signal* case discussed above. In its November 6, 1992 order, the Board invited the parties in this appeal to submit briefs on the questions that had been designated in the order scheduling oral argument in *Allied-Signal*. Subsequently, the *Allied-Signal* case was settled prior to oral argument, and the Board directed (rather than invited) GE and the Region to file briefs on the questions specified in the *Allied-Signal* case by February 10, 1993. In addition, the Board directed GE and the Region to prepare for oral argument on those same questions. For purposes of the oral argument, the Board later consolidated this case with *In Re UOP, Shreveport Plant,* RCRA Appeal No. 91–21, which involves the same issues. The oral argument was held on February 14, 1993.

## II. *DISCUSSION*

Before turning to GE's arguments, it is first necessary to address the Region's argument that this case is not ripe for disposition. In support of this argument, the Region cites the decision of the U.S. Court of Appeals for the First Circuit in *W.R. Grace. and Co.—Conn.* v. *EPA,* 959 F.2d 360 (1st Cir. 1992), in which the permit provisions at issue in the Agency's *Grace* decision were appealed. The First Circuit found that the permittee's claim in that appeal was not ripe for disposition because there was no concrete dispute over a particular revision of an interim submission. *Id.* at 365.

We reject the Region's ripeness argument. The *judicial* doctrine of ripeness applied by the First Circuit in its *Grace* decision to determine whether it should decline to hear a challenge to the Agency's action has no direct application in the context of a permit proceeding within the Agency. Moreover, this appeal is clearly fit for disposition at this time. Under 40 CFR § 124.19(a), the Board has authority to "review any condition" of a "final permit decision." This authority extends to challenges that call for some change in the language of the permit, either to modify or remove language already contained in the permit or to add language that should be in the permit.[7]

[7] The challenge must be to the permit *as it reads at the time of issuance.* Thus, when a petitioner is not challenging the language of the permit as it reads at the time of issuance, but is really challenging the way the Region might implement the

Accordingly, in the context of permit appeals under Section 124.19(a), an appeal is "ripe" or fit for disposition by the Board if a final permit decision has been issued by the Region, and the petitioner is challenging the permit as it now reads. In this case, the Region has issued a final permit decision, and GE is challenging the *permit* as issued. It is taking the position that the permit, as it now reads, is defective because of the absence of a dispute resolution provision in the permit. This objection to the permit is thus properly before the Board and appropriate for disposition.

A. *Modification of the Permit*

Under 40 CFR § 270.41, which governs Agency-initiated modifications of RCRA permits, the Agency may modify a permit if it determines that one or more "causes for modifications" are present. The causes for modification are listed in the regulation. One of those causes is that the Region has received information that was not available at the time of permit issuance and which would have justified the application of different permit conditions at the time of issuance if it had been available. GE argues that, when the Region revises an interim submission, it is doing so on the basis of new information gathered by the permittee that was not available at the time the permit was issued and that, if such information had been available at the time of permit issuance, the permit would have contained "different" permit terms. GE argues that, inasmuch as the Region is modifying the permit within the meaning of Section 270.41, it must accomplish the modification in accordance with that section and Part 124.[8]

Region I argued at oral argument and in its brief that the modification regulations were promulgated before 1984 and do not really

permit, the Board has declined to consider such a challenge. *See General Electric,* RCRA Appeal No. 91–7, at 14 (EAB, November 6, 1992).

[8] GE also argues that the Agency's position that revisions of interim submissions are not "modifications" of the permit for purposes of the formal modification procedures in Section 270.41 and Part 124 clearly implies that permittees have no right to judicial review of those requirements under § 7006(b). We need not dwell for long on GE's suggestion that the Agency is somehow improperly depriving GE of its statutory right to judicial review because, as GE itself concedes, "[a] decision by the EPA Administrator cannot actually deprive a permittee of a statutory right to judicial review; if such a right exists, the courts will enforce it." GE Supplemental Brief, at 27. We note, however, that in holding that a revision of an interim submission by the Region is not a "modification" of the permit subject to the formal modification procedures in Section 270.41 and Part 124, neither the *Grace* decision nor this Board expresses or implies any position about the availability of judicial review under RCRA Section 7006(b). *See* note 22 *infra*.

speak directly to the issue of interim submissions as part of the corrective action process. The Region argues that the regulation on its face applies to new information which would have justified different permit conditions. Here, the Region argues, the new information gathered by the permittee does not justify permit conditions different from those in the permit, but rather merely implements and satisfies the information-gathering conditions already in the permit.

We agree with the Region's position. The new information presented in the interim submission is not the kind of new information contemplated in Section 270.41. The new information contemplated in that section comes to light unexpectedly and changes an erroneous assumption on which the original permit was based, and it leads to the removal or alteration of inappropriate permit terms that were based on the erroneous assumption. By contrast, the new information presented in an interim submission comes to light in accordance with the process established in the original permit precisely for the purpose of generating that supplementary information. It does not rectify a mistake or change a fundamental assumption in the original permit. It is used merely to make obligations that are already in the permit more specific. Thus, although there is no question that the incorporation of a revised interim submission as an enforceable part of the permit changes the existing permit, the change occurs automatically through the operation of the permit and not at the initiation of the Agency. Final Permit, at 86, 97, 105, 112. The fact that a Region revises the interim submission does not change this analysis.[9] When the Region revises an interim submission, it is exercising its authority under the existing permit language to ensure that the contemplated studies and investigations are adequate for selection of corrective remedies. The Region's revisions are part of a process contemplated in the original permit by which the general terms of the original permit are made more specific. Thus, when the Region makes such revisions, it is fulfilling the terms of the permit, not changing them. For all the foregoing reasons, we conclude

[9] In its brief, GE implicitly takes the position that a modification subject to Section 270.41 does not occur when an *un*contested interim submission becomes an enforceable part of the permit. At oral argument, however, GE's counsel was asked whether a modification subject to Section 270.41 occurs when an uncontested interim submission becomes an enforceable part of the permit. GE's counsel responded that it is not an issue in this case and conceded that he had not thought much about whether a member of the public would be able to argue that an uncontested interim submission would be a modification. Hearing Transcript, at 15–16. GE has provided no supportable distinction to show why, under § 270.41, contested and uncontested submissions should be treated differently. In our view, for purposes of § 270.41, they should be treated the same; neither is a permit modification.

that Regional revisions to interim submissions are not appropriately characterized as modifications of the permit subject to the formal modification procedures of Section 270.41 and Part 124.

*Subpart S:* GE argues that support for its position can be found in the preamble to the proposed Subpart S rule. The Subpart S rule would establish a comprehensive regulatory framework for implementing the Agency's corrective action program. The proposal is relevant because it "constitutes the Agency's most recent comprehensive statement of its views regarding corrective action under RCRA § 3004(u)." *Sandoz Pharmaceuticals Corporation,* RCRA Appeal No. 91–14, at 9 (EAB, July 9, 1992); *see also W.R. Grace & Company,* RCRA Appeal No. 89–28 (Adm'r, March 25, 1991). The Subpart S rule provides for a set of streamlined procedures for modifying schedules of compliance in a corrective action program. 55 Fed. Reg. 30,883 (proposed 40 CFR § 270.34(c)). The new procedure is less time-consuming than the modification procedure contained in Section 270.41 because the results of the procedure may be appealed directly to a court, thus bypassing administrative review. The Region would be able to use the new procedure as an alternative to Section 270.41 in cases where the Region believes that time is of the essence. The preamble to the Subpart S proposal notes that this abbreviated modification procedure "provides a mechanism to resolve disputes which may arise between the permittee and the Agency concerning the scope or meaning of conditions in the schedule of compliance when those disagreements cannot be resolved through less formal means." *Id.* at 30,847. For example, the procedure could be used when disputes arise over "the scope of remedial investigation and how many monitoring wells may need to be installed, or the appropriate soil sampling procedure." *Id.* at 30,849. GE believes that this procedure is intended to be available for the resolution of disputes over revisions to interim submissions. GE argues, therefore, that the proposed Subpart S rule recognizes that imposition of subsequent requirements on permittees through revision of interim submissions constitutes a permit modification, albeit with procedures different from those currently in Section 124.19.

We disagree with GE's argument that the Subpart S proposal supports its position. The preamble to the proposed corrective action rule makes quite clear that when a permit provides that interim submissions will become enforceable obligations under the permit, those submissions (even if revised by the Region) become part of the permit not through a modification procedure but by operation

of the permit. 55 Fed. Reg. at 30,812.[10] GE argued at oral argument that the cited passage only applied to "approved" interim submissions and therefore has no relevance to this case, but the passage clearly applies to interim submissions that have been approved *after being revised by the Region.*

The preamble's discussion of the abbreviated modification procedure also provides no support for GE. That procedure applies only to *Agency-initiated* modifications of the schedule of compliance. At issue here, however, are changes to the permit that occur not at the initiation of the Agency but by operation of the permit. Moreover, the preamble discussion makes clear that the abbreviated modification procedures would apply to revisions of interim submissions only *after* those submissions have become enforceable obligations of the permit:

> It is important to note that for the purposes of this provision * * *, any plan submitted by the permittee pursuant to a schedule of compliance and approved by the Director, becomes an enforceable part of the schedule. Accordingly, *modifications to such plans* will be required to follow the appropriate procedures of § 270.41, 270.42, or 270.34(c).

*Id.* at 30,848 (emphasis added). Thus, the quoted passage makes clear that changes to interim submissions only constitute modifications of the permit *after* the interim submissions are approved by the Region and incorporated into the permit. Finally, we note that

[10] The preamble provides as follows:

> Plans for conducting remedial investigations would be subject to review and approval or modification by the Regional Administrator. When a workplan submitted for the Regional Administrator's approval does not adequately address all elements of the investigation, the Regional Administrator may either disapprove the plan and return it to the permittee for review, or make modifications to the plan and return the modified plan to the owner/operator as the approved plan. * * * An approved plan will establish both requirements applicable to the conduct of the investigation and a schedule for its implementation. Section 264.512(b) would provide regulatory authority for enforcing compliance with the approved plan, which becomes an enforceable part of the permit schedule of compliance. *In most cases, it is expected that the initial permit will specify that the plan becomes an enforceable component of the permit upon approval.* Alternatively, the permit may be modified to incorporate the provisions of the approved plan.

(Emphasis added.)

GE's interpretation of the Subpart S proposal was rejected in the Agency's *Grace* decision. *In re W.R. Grace & Company,* RCRA Appeal No. 89–28 (Adm'r, March 25, 1991). That decision was issued by the same Administrator who signed the Subpart S proposal, giving particular credence to his interpretation of that proposal. For all the foregoing reasons, we reject GE's contention that its position finds support in the Subpart S proposal.

B. *The Due Process Requirements for an Administrative Hearing*

GE argues that even if the revision of an interim submission and its incorporation as an enforceable obligation of the permit do not constitute a modification of the permit subject to the procedures of Section 270.41, the Agency is nevertheless required under the due process clause to give GE an opportunity for a hearing to voice its objections before GE is required to comply with a revised interim submission. GE believes, therefore, that the permit should contain a dispute resolution provision that provides for an administrative hearing and subsequent judicial review.

The due process clause of the Fifth Amendment to the U.S. Constitution provides that the government may not deprive a person of his or her property without due process of law. Essentially, the due process clause guarantees that before a deprivation of property occurs, the person being deprived must be given notice of the impending deprivation and an opportunity for a hearing at which he or she can present reasons why the deprivation should not take place.[11] What form this "hearing" will take depends on the type of case involved.[12] In one type of case, the hearing might be a formal, evidentiary hearing with many of the procedural safeguards associated with court proceedings, like the right to cross-examine adverse witnesses.[13] In another type of case the hearing might be nothing more than an informal meeting with a person who has authority to prevent

[11] *Mathews* v. *Eldridge,* 424 U.S. 319, 333 (1976) (citation omitted) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *Cleveland Board of Education* v. *Loudermill,* 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (citation omitted).

[12] *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Buttrey* v. *United States,* 690 F.2d 1170, 1178 (5th Cir. 1982) ("A procedure that seems perfectly reasonable under one set of circumstances can, with only a slight modification of the facts, suddenly 'smack * * * of administrative tyranny.'") (citation omitted).

[13] *See, e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (termination of welfare benefits).

the deprivation.[14] In still another type of case, just the opportunity to present objections in writing (a "paper hearing") without the opportunity for an oral presentation is enough to satisfy due process.[15] The nature of the hearing required by due process in a particular type of case (*i.e.,* which procedures will be used in conducting the hearing), is determined by weighing the interests of the person being deprived of property, the burden on the government of providing the particular procedures at issue, and the value of the procedures in reducing the risk of an erroneous determination.[16]

In analyzing GE's due process argument, we consider below (1) whether the revision of an interim submission constitutes a significant deprivation of GE's property, thus requiring the Region to provide GE with the opportunity for a hearing, *i.e.* an opportunity to dispute the revision;[17] (2) if the Region must provide GE with the opportunity to dispute the revision, whether the dispute resolution procedure proposed by the Region in this case or the dispute resolution procedure developed by the various Regions subsequent to the *Grace* decision satisfy due process; and (3) if the Region must provide GE with the opportunity to dispute a revision to an interim submission, whether the permit should be used as a vehicle to set out the elements of a dispute resolution procedure.

*A Deprivation of Property:* The first question to be answered is whether a deprivation of property occurs when a permit is revised to require compliance with a revision to an interim submission. We believe that one does. As GE argues, once a permit has been granted, the permittee has a constitutionally protected property interest in that permit. *Kerley Industries, Inc.* v. *Pima County,* 785 F.2d 1444 (9th Cir. 1986). Because interim submissions flesh out a permit that is written in general terms, a revision to an interim submission has a material and, not infrequently, substantial effect in defining the permittee's obligations under the permit. In most cases, the Region's interpretation of what the original terms of the permit require will be more costly to fulfill than the permittee's interpretation of

[14] *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1, n.17 (1978) ("The opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances.").

[15] *Mathews* v. *Eldridge,* 424 U.S. at 344–47.

[16] *Id.*

[17] As used in this context, the term "hearing" means only an opportunity to present reasons why the interim submission should not be revised. It does not mean a formal trial-like proceeding with all the procedural safeguards associated with court proceedings.

what the original terms of the permit require. Region I apparently agrees with the conclusion that a deprivation of property occurs, for it did not dispute GE's assertion that there is a deprivation in any of its briefs or at oral argument. In addition, several courts have assumed without discussion that an Agency decision requiring a person to comply with a requirement of RCRA can result in a deprivation of property for purposes of the due process clause. *See, e.g., Chemical Waste Management, Inc.* v. *U.S. E.P.A.,* 873 F.2d 1477 (D.C. Cir. 1989); *W.R. Grace & Co.—Conn.* v. *U.S. E.P.A.,* 959 F.2d 360, 365 (1st Cir. 1992). Having concluded that a deprivation of property occurs, we consider next what kind of a hearing the Agency must provide.

*The Dispute Resolution Provisions:* In the Agency's *Grace* decision, the Administrator stated that, until the Agency formally promulgates a hearing procedure for disputes over Regional revisions to interim submissions, the Regions are expected to ensure that each permittee "receives an adequate opportunity to be informed of, and to respond to, any Regional revisions to the interim submissions prior to Regional approval." *Grace,* at 4. In response to that decision, each Region has developed a dispute resolution provision to be included in corrective action permits that gives the permittee an opportunity to voice any objections it may have to Regional revisions of interim submissions. Transcript at 64–65. Although the dispute resolution provisions developed by the Regions are similar, they are not uniform, and an Agency-wide position on the content of such clauses has not been articulated, at least not in writing. Transcript at 65. At oral argument, Region I laid out the elements of the dispute resolution clauses developed by the Regions, as follows:

> —The permittee has the right to submit written statements to staff members responsible for making the disputed revisions and to meet informally with such staff members.
>
> —The permittee has the right to meet with someone higher up in the chain of command within the Region who will serve as the final decision-maker. In some Regions, this person is the Regional Administrator. In other Regions, the permittee may meet with the Regional Administrator or his or her delegate. In other Regions, the permittee has a right to meet with the Director of the Waste Management Division.

> —The Region must issue a written decision on a written record, responding to the evidence and arguments of the permittee.

Transcript at 52, 65, 78–79. It is not clear whether the Regions believe that the procedures they have developed in response to the *Grace* decision represent the minimum required by due process or whether they are meant to provide more protection than is required by due process. Transcript at 78, 88–89.

The permit at issue here does not contain a dispute resolution provision. During settlement negotiations, however, the Region did offer to include such a provision in GE's permit. Exhibit D, GE Supplemental Brief. Under the proposed provision, GE would be able to meet with unspecified Regional staff members, and if such a meeting does not lead to a resolution, the Waste Management Division Director would make the final decision on the dispute. It is not clear whether the permittee would have the right to meet with the Division Director.[18]

*GE's Argument:* GE argues that the dispute resolution procedure offered by the Region is inadequate for the following reasons. First, GE believes that the Waste Management Division Director, by virtue of his or her close relationship to the Regional permitting staff, simply cannot be expected to act with the impartiality required by due process. In GE's view, only the Regional Administrator or the director of another division within the Region would come close to having the requisite degree of impartiality. GE maintains, however, that *no one* who works within the Region can be sufficiently impartial to satisfy due process completely. Any decision made by the Region will be tainted by institutional bias, according to GE. GE believes that this taint of bias can only be cured for purposes of due process

[18] The Region suggested that 40 CFR § 270.42 provides permittees with an opportunity for an adequate due process hearing. Under that section, a permittee could get a hearing in front of the Board simply by requesting a permit modification to remove a revised interim submission from the permit. The denial of that request could then be appealed to the Board. We are of the view, however, that Section 270.42 does not provide permittees with an adequate due process hearing because, when a permittee requests modification of the permit under Section 270.42, the contested permit provisions are *not* stayed during the pendency of the proceedings. Thus, the hearing is really a post-deprivation hearing rather than a pre-deprivation hearing. As was held in the Agency's *Grace* decision, however, due process requires that "the permittee receives an adequate opportunity to be informed of, and to respond to, any Regional revisions to the interim submissions *prior* to Regional approval." *In re W.R. Grace & Company,* RCRA Appeal No. 89–28, at n.5 (March 25, 1991) (emphasis added).

if GE is able to obtain judicial review of the decision *before* GE is required to comply with the disputed permit requirement or face an enforcement action and possible penalties. GE argues, therefore, that due process requires the Agency to provide that the Region's decision on a dispute over revisions of interim submissions will constitute final agency action, thereby opening the way for GE to seek pre-enforcement judicial review of the decision. Transcript at 25–28.

Below we discuss GE's arguments relating to the impartiality of the decisionmaker and the need for judicial review. We also discuss the issue of whether the right to make an oral presentation to the decisionmaker is required by due process in the context of revisions of interim submissions. The need for this procedural safeguard was raised by GE but was not contested by the Region, and in fact, the Region represented at oral argument that the right to make an oral presentation to the final decisionmaker is included in the dispute resolution provisions currently being used by the Regions. We nevertheless discuss this safeguard below because we believe that whatever policy considerations may militate in its favor, it is *not* an essential element of due process in the context of revisions of interim submissions.

In its Supplemental Brief on Appeal, GE mentioned four other procedural safeguards as essential requirements of the due process hearing that the Region must provide to GE in the event of a dispute over a revision of an interim submission: (1) the hearing must take place before the permittee is expected to comply with the revision to an interim submission; (2) notice detailing the Region's reasons for proposing to revise or require revision to the interim submission; (3) a decision based on the record; (4) a statement of reasons explaining the Region's final decision and responding to the arguments submitted by GE. The need for these four safeguards was not disputed by the Region either in its brief or at oral argument, and in fact the third and fourth safeguards are included in the dispute resolution procedures laid out by the Region at oral argument. Accordingly, we do not address these four safeguards below. We note, however, that these four safeguards are already required either implicitly or explicitly by the Administrator's *Grace* decision. *W.R. Grace & Company,* RCRA Appeal No. 89–28, at 3–4 & n.5 (Adm'r, March 25, 1991).[19]

[19] Two other safeguards that are among the panoply of possible procedural safeguards are the right to be represented by retained counsel and the right to cross-examine adverse witnesses. *Goldberg* v. *Kelly,* 397 U.S. 254, 269–271 (1970). These

Continued

*Mathews* v. *Eldridge:* In determining whether a particular procedural safeguard is required by due process in the context of a dispute over a revision to an interim submission, it is necessary to go through the familiar three-step inquiry set out by the U.S. Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). That inquiry includes the following considerations:

(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;

(3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Before we discuss the particular safeguards at issue here, some general observations about the application of the *Mathews* v. *Eldridge* test are in order. First, when evaluating the burden on the Agency of providing any particular safeguard in its hearing procedure, we are mindful that, to date, the Agency did not identify a single instance where a permittee has availed itself of the formal dispute resolution provisions that the Regions have been putting into permits since the *Grace* decision was issued. Transcript at 75. Moreover, as a practical matter, we would expect that permittees will not want to squander the good will of Regional staff by invoking the dispute resolution procedures with frivolous and dilatory objections.

As for the interests of permittees, such interests will vary according to the particular circumstances of each case. In exceptional cases, Regional revisions could conceivably involve costs of millions of dollars while the vast majority of revisions will involve increased costs of nowhere near that much. Because the financial stakes can vary so widely from case to case, it is conceivable that the procedural protections that would satisfy due process in ordinary cases might not satisfy due process in a case involving extraordinarily high finan-

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two safeguards were not raised by GE, and we have not addressed them in our discussion in the text. With respect to cross-examination, however, we note that the right to cross-examine witnesses is not included in the procedures of 40 CFR Part 24, governing challenges to RCRA § 3008(h) corrective action orders, or even in the procedures in Section 270.41, governing Agency-initiated permit modifications. GE agrees that either set of procedures would satisfy due process in this case.

cial stakes.[20] In such an extraordinary case the interest of the permittee might tip the *Mathews* v. *Eldridge* balance in the direction of more procedural protection. This possibility was recognized by the U.S. Court of Appeals for the First Circuit in its decision in *W.R. Grace & Co.—Conn.* v. *U.S. E.P.A.*, 959 F.2d 360, 365 (1st Cir. 1992):

> We suspect that the magnitude of any dispute between the parties—whether EPA requires the company to drill an additional five or five hundred sampling wells over Grace's objection, for example—will shape our judgment as to what the Constitution requires.

At oral argument, the Region also recognized this possibility, noting that the dispute resolution procedures developed by the Regions would not necessarily be adequate in all cases:

> EPA's dispute resolution provision was drafted to accommodate the great majority of disputes arising out of interim submissions. It is EPA's intent to provide additional process where the facts of a specific situation warrant such additional process.

Transcript at 67. In extraordinary cases, counsel for the Region suggested that the modification procedures at Section 270.41 might be appropriate, although he was careful to note that the Agency still would not regard the revision as a permit modification. Transcript at 61.

In light of the possibility that cases involving extraordinarily high financial stakes might warrant extra procedural safeguards, the conclusions in this opinion as to what due process requires in the context of revisions of interim submissions, while holding true in the vast majority of cases, should not be taken to apply to such extraordinary cases. We recognize that in some cases, due process may require the Regions to offer more procedural protection than is afforded by the dispute resolution procedures. We must of necessity leave it to the Regions to determine on a case by case basis which cases warrant such special treatment.

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[20] *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Buttrey* v. *United States*, 690 F.2d 1170, 1178 (5th Cir. 1982) ("A procedure that seems perfectly reasonable under one set of circumstances can, with only a slight modification of the facts, suddenly 'smack * * * of administrative tyranny.'") (citation omitted).

Having made those general observations, we turn now to consider the impartial decisionmaker requirement, the need for judicial review, and the right to make an oral presentation to the final decisionmaker.

*Impartial Decisionmaker:* In the dispute resolution provision offered to GE during settlement negotiations, the final decisionmaker is the Region's Waste Management Division Director. In the Agency's current dispute resolution procedures as described by the Region at oral argument, the final decisionmaker is the Waste Management Division Director in some Regions and the Regional Administrator or his or her delegatee in other Regions. As noted above, GE believes that the Waste Management Division Director, because of his or her ostensible identification with the Regional permitting staff, cannot be expected to act with the impartiality required by due process. In GE's view, the Regional Administrator or the director of another division within the Region would come closest to having the requisite degree of impartiality, although GE believes that no person within the Region would be completely free of institutional bias. Transcript at 25–28. Within the framework of *Mathews* v. *Eldridge*, GE's argument is that the risk of an erroneous deprivation would be significantly reduced if the Regional Administrator or the director of a division other than the Waste Management Division served as the final decisionmaker, because they would be less influenced by institutional bias than the Waste Management Division Director.

We are not persuaded that the risk of an erroneous deprivation is significantly higher when the Waste Management Division Director is the decisionmaker than when the Regional Administrator is the decisionmaker, because we do not believe that the Waste Management Division Director would be unduly influenced by "institutional bias." It is axiomatic that due process requires an impartial decisionmaker.[21] But it is also well established that, in a due process hearing at an administrative agency, the decisionmaker need not be independent from the agency to serve as an impartial decisionmaker. For example, in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), which represents the high water mark of affording procedural due process, the Supreme Court held that before the City of New York could terminate a welfare recipient's benefits, it must provide

[21] *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970) ("And, of course, an impartial decision maker is essential."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); *Hummel* v. *Heckler*, 736 F.2d 91, 93 (3rd Cir. 1984) ("Indeed the absence in the administrative process of procedural safeguards normally available in judicial proceedings has been recognized as a reason for even stricter application of the requirement that administrative adjudicators be impartial.").

the recipient with an opportunity for an evidentiary hearing with an impartial decisionmaker. The Supreme Court held that the "prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker." *Id.* at 271. In another case, *Withrow* v. *Larkin,* 421 U.S. 35, 52 (1975), the Supreme Court held that an agency employee can serve as an impartial decisionmaker for due process purposes, even if that employee participated in the investigation of the case over which he or she is to preside in an adjudicative capacity. The Court noted in *Withrow,* moreover, that agency employees serving in an adjudicative capacity are presumed to act with honesty and integrity. *Id.* at 47. Thus, the mere fact that the Regional permitting staff work under the Waste Management Division Director does not by itself disqualify the Division Director from serving as an impartial decisionmaker for due process purposes.

The conclusion that the Waste Management Division Director can serve as an impartial decisionmaker for due process purposes is supported by the decision of the U.S. Court of Appeals for the District of Columbia in *Chemical Waste Management, Inc.* v. *U.S. E.P.A.,* 873 F.2d 1477, 1484 (D.C. Cir. 1989). The *Chemical Waste* decision addresses a due process challenge to the regulations at 40 CFR Part 24, which contain the procedures EPA must follow when it imposes corrective action orders on interim status facilities under RCRA Section 3008(h), 42 U.S.C § 6928. Part 24 provides for a hearing conducted by a presiding officer. Under Part 24, that presiding officer can be any attorney who has had no prior connection to the case. The permittee in the *Chemical Waste* case argued that Part 24 procedures did not ensure an impartial decisionmaker because even if the presiding officer meets the criterion of having no prior connection to the case he or she might still be influenced by "institutional biases and prosecutorial zeal." *Id.* at 1484. In rejecting this argument, the Court relied on *Withrow* v. *Larkin,* 421 U.S. 35 (1975), in which the Supreme Court ruled that investigative and adjudicative functions could be combined in a single decisionmaker without necessarily violating due process. The Court also noted that there is a "presumption of honesty and integrity in those serving as adjudicators." *Chemical Waste,* 873 F.2d at 1484. Similarly, we conclude that the Division Director is not prevented by "institutional bias" from serving as an impartial decisionmaker for due process purposes.

For policy reasons, however, we believe that the final decisionmaker for the Agency should be the person with authority to issue the final permit decision itself. Since interim submissions

substantially define the obligations of the permit, Regional revisions to interim submissions can have very significant financial consequences for the permittee, comparable to the consequences flowing from the terms of the original permit. Therefore, we believe that as a matter of fairness to the permittee, the person within the Region who has final authority to issue the original permit should also be the final decisionmaker in any dispute over a revision to an interim submission. In that way, decisions on disputes over revisions to interim submissions would be treated with the same importance as decisions pertaining to the original permit. By the same token, disputes over revisions of interim submissions should not be given more importance than decisions relating to the original permit. Thus, if the Division Director holds delegated authority to make final decisions on the original permit, it would be inappropriate and incongruous to send the dispute to the Regional Administrator, since that would give decisions on disputes over revisions of interims submissions more importance than is given to decisions on the original permit decision itself. Thus, the Board is of the view that, for policy reasons, the dispute resolution provisions in corrective action permits should provide that the final decisionmaker in disputes over revisions to interim submissions is the person within the Region who has delegated authority to make final decisions on the original permits.

We do not believe that such a requirement will be unduly burdensome in those Regions where the Regional Administrator has retained authority to make final decisions on the original permit. We note that according to Agency counsel, this is already Agency practice in a number of Regions, and further, to date, not a single permittee has invoked the dispute resolution provisions that Regions began putting into permits in response to the *Grace* decision. Transcript at 75. We also think that any potential burden is mitigated by our finding that there is no due process right to make an oral presentation to the final decisionmaker. *See infra* at p. 28.

*Judicial Review:* While GE believes that the Regional Administrator comes closer to having the requisite degree of impartiality for due process purposes than the Waste Management Division Director, GE maintains that *no one* who works within the Region can be sufficiently impartial to satisfy due process completely. Any decision coming out of the Region will be tainted by institutional bias, according to GE, and the taint of bias can only be cured for purposes of due process if GE is able to obtain judicial review of the decision. GE argues, therefore, that the Agency cannot fully satisfy the require-

ments of due process unless it provides that the Region's decision will constitute final agency action, thereby opening the way for GE to seek judicial review of the decision under the Administrative Procedure Act. Transcript at 25–28.

We do not believe that the Agency is required by due process to provide in the permit that the Region's decision will constitute final agency action. Even if due process requires that the administrative hearing in the context of a revision to an interim submission be followed by an opportunity for judicial review, such an opportunity will be available to GE even if the permit does not provide that the Region's decision is final agency action. At oral argument the Region took the position that a permittee will be able to obtain judicial review of a revision of an interim submission in an enforcement action for failure to comply with the interim submission. It is not clear whether the Region believes such review would be de novo or deferential, but it is clear that the Region believes the underlying obligation could be challenged in an enforcement proceeding. Transcript at 56.[22]

The Region acknowledged, however, that during the pendency of an enforcement proceeding, daily penalties would continue to accumulate even if GE were challenging the underlying permit obligation that formed the basis for the enforcement action. Transcript at 74. Because of these accumulating penalties, GE argues that the opportunity for review during an enforcement action would not be meaningful because no rational permittee would risk accumulating daily penalties to find out whether the challenged permit term is improper. In support of its argument, GE cites a line of cases beginning with *Ex Parte Young,* 209 U.S. 123 (1975), that stand for the proposition that:

> [O]ne has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost. The constitutional requirement is satisfied by a statutory scheme which provides for an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties.

[22] We leave it for the courts to decide whether GE would have an earlier opportunity for judicial review under the Administrative Procedure Act.

*Brown* v. *Williamson Tobacco Corp.* v. *Engman,* 527 F.2d 1115, 1119 (2nd Cir. 1975) (emphasis in the original).

We are unpersuaded by GE's argument. If an enforcement action with accumulating daily penalties represented GE's only opportunity to contest the validity of a revision of an interim submission, GE's argument might have some force. But in this case, GE will have an opportunity for a hearing at the administrative level before it is expected to comply with a revision. Even if GE is correct that such an administrative hearing must be followed by some form of judicial review to satisfy due process,[23] we are convinced that the combination of a hearing before the Agency followed by the opportunity for judicial review at the enforcement stage of the proceedings is all that due process requires. This conclusion is supported by the decision of the U.S. Court of Appeals for the First Circuit in *U.S.* v. *Charles George Trucking Co.,* 823 F.2d 685, 691–92 (1st Cir. 1987). In that case, the owners of a hazardous waste dump received a written request for information from EPA. When the owners failed to respond to the request, EPA successfully sued the owners in federal court for civil penalties for their failure to respond. On appeal, the owners, citing *Ex Parte Young,* argued that their due process rights had been violated because their only opportunity to challenge EPA's information request was in the enforcement action when daily penalties were accumulating. The Court rejected this argument because EPA had notified the owners that failure to respond could result in an enforcement action and had offered them an opportunity to justify their failure to respond to the information request. Because the Court was satisfied that EPA had given the owners the notice and opportunity to respond that due process requires, it rejected

[23] Courts have recognized that when an administrative agency provides a full hearing at the administrative level with all of the procedural safeguards that are appropriate under the circumstances, due process does not require that the administrative hearing be followed by judicial review. *See Ortwein* v. *Schwab,* 410 U.S. 656 (1973)($25 filing fee to seek review of administrative decision in appellate court did not violate due process rights of indigents, where they received an adequate hearing at the administrative level); *Saharoff* v. *Stone,* 638 F.2d 90, 92 (9th Cir. 1980) (judicial review was not an essential element of due process where Saharoff participated in an adversary proceeding before an administrative law judge); *Heirs of Garvey* v. *Sion Farm Esso Service Center,* 838 F.2d 98, 100 (3rd Cir. 1988)(Due process did not require judicial review of decision of the Virgin Islands Criminal Victims Compensation Commission denying claim for compensation, where the relevant act provided for contained adequate procedural means for fair determinations at the agency level). *Cf. Haskell* v. *U.S. Department of Agriculture,* 930 F.2d 816, 820 (10th Cir. 1991) ("Although Haskell was not afforded an evidentiary hearing at the administrative level, he sought and received de novo review of the administrative decision from the district court. When such an opportunity for judicial review exists, the lack of an evidentiary hearing at the administrative level is not a denial of due process.").

their *Ex Parte Young* argument. *Id.* at 690–92. Similarly, because we believe that the dispute resolution procedures developed by the Regions and refined in this decision will provide GE with notice and an adequate opportunity to respond, we reject GE's *Ex Parte Young* argument.

*Oral Presentation of Evidence and Arguments:* The dispute resolution provision offered to GE during settlement negotiations provides that in the event the permittee is not able to reach an agreement with unspecified Regional staff members, the dispute will be decided by the Waste Management Division Director. It is not clear from the proposed provision whether the permittee would have the right to make an oral presentation to the Division Director. As noted above, the dispute resolution provisions developed by the Regions, as laid out by Region I at oral argument, provide that the permittee has a right to make an oral presentation to Regional staff members, and in the event no agreement is reached, the permittee has the right to make an oral presentation to someone higher up in the Regional organization (in some Regions, the Waste Management Division Director, and in other Regions, the Regional Administrator or his or her delegatee). Transcript at 52. While the dispute resolution procedures described by Region I at oral argument give the permittee the right to make an oral presentation of its arguments to the final decisionmaker, we are not convinced that due process requires the Region to include that procedural safeguard. In *Mathews* v. *Eldridge*, the Supreme Court noted that oral presentation to the decisionmaker has less value in the context of disability benefit determinations than it does in the welfare context of *Goldberg* v. *Kelly*, because disability determinations, based as they are on medical diagnoses and assessments of the recipient's ability to work, are "amenable to effective written presentation." *Mathews* v. *Eldridge*, 424 U.S. 319, 345 & n.28 (1976). The same reasoning applies in the context of this case. Corrective action determinations turn on technical data which is amenable to effective written presentation. An oral presentation to the final decisionmaker, therefore, would not significantly reduce the risk of an erroneous determination, and any effect it would have would be outweighed by the real (albeit modest) burden on the Agency of providing for such oral presentation. In arriving at this conclusion, we are mindful that the permittee will have an opportunity to make an oral presentation to the Regional staff before the dispute goes to the final decisionmaker.

Nevertheless, while the right to make an oral presentation to the final decisionmaker is not compelled as a matter of due process,

we note that the Region envisions a meeting between the permittee and the final decisionmaker as part of the dispute resolution procedure. We think this is a sound practice, and we encourage the Regions to retain this feature in their dispute resolution provisions.

*Providing for Dispute Resolution in the Permit:* Having determined that a dispute resolution procedure is required and having addressed what type of dispute resolution procedure is required, we consider next whether the dispute resolution procedures should be laid out in the permit itself. We have seen no case law to support the proposition that due process requires that hearing procedures for disputes over a permit must be laid out in the permit itself. As long as the permittee is given the requisite notice and hearing at a meaningful time, it does not matter whether the permit itself lays out the particular hearing procedure to be used. While the absence of a hearing might violate due process, the absence of language in the permit laying out the hearing procedure does not in itself violate due process. Nor is there anything in the statute or the regulations to suggest that corrective action permits are legally required to include procedures for a due process hearing in the permit.

Nevertheless, we believe that GE's permit should include such procedures as a matter of policy. As discussed above, the Agency is required to provide a hearing in the event the permittee disagrees with a Regional revision of its interim submissions. Because the need for the hearing is created by the language of the permit as issued, we believe that the permit itself is the best vehicle to provide for the fulfillment of that need. Requiring the Agency to include dispute resolution procedures in permits will best ensure that permittees are informed in a timely fashion of the availability of a hearing. Moreover, placing these procedures in corrective action permits will give reassurance of fairness to the regulated community whose obligations under their permits remain to be spelled out at a later date.[24]

## III. *CONCLUSION*

A revision by the Region of an interim submission will not constitute a modification of the permit subject to the formal modification procedures at 40 CFR § 270.41 and 40 CFR Part 124. However, before

[24] Previously issued final permits that do not contain dispute resolution procedures need not be reopened or modified to add such procedures. The policy goals to be served by including hearing procedures in permits would not justify the burden and disruption that would be caused by reopening or modifying all such permits. Of course, persons holding such permits will have the same right to a due process hearing as those holding permits with the hearing procedures specified therein.

the Region approves the revised interim submission, it must give GE the opportunity for a hearing,[25] and the procedures for such a hearing should be set out in GE's permit. The hearing procedures should be patterned after the dispute resolution provision described by the Region at oral argument but modified as necessary to conform with this decision. Thus, the dispute resolution provision to be inserted into GE's permit should provide that, if GE and the Regional permitting staff cannot resolve the dispute, GE will have the right to submit written arguments and evidence to the person in the Region who has authority to make the final permit decision for the Region, *i.e.,* either the Regional Administrator or the person to whom the Regional Administrator has delegated authority to make final permit decisions. The dispute resolution provision, however, need not grant GE the right to make an oral presentation to the final decisionmaker, although the Board does not wish to discourage the Region from providing this opportunity if it chooses to do so.

This case is remanded to the Region to make appropriate changes to the permit in light of this opinion.

So ordered.

[25] *See* note 17 *supra.*