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

In re:	)	
Caribe General Electric Products, Inc.	)	RCRA Appeal No. 98-3
Docket No. PRD 090510793	)	

ORDER DENYING RECONSIDERATION IN PART AND GRANTING RECONSIDERATION IN PART

I. *BACKGROUND*

On February 17, 2000, Caribe General Electric Products, Inc. ("CGE") filed a motion for reconsideration of the Environmental Appeals Board's February 4, 2000 Order Denying Review in Part and Remanding in Part ("Order") in the above-captioned proceeding. In its motion for reconsideration ("Motion"), CGE contends that reconsideration is warranted because the Board erred by: (1) concluding that the Environmental Protection Agency ("EPA") had the authority to issue a Final Permit requiring off-site corrective action for Areas of Concern ("AOCs") not associated with a release from on-site Solid Waste Management Units ("SWMUs"); (2) concluding that there was a sufficient nexus between AOC-1 and releases from CGE's facility (the "Facility") to support corrective action against AOC-1; (3) finding that the

Final Permit would ensure the company's due process rights; and (4) imposing interim corrective measures ("ICMs") in the Final Permit without providing for formal permit modification procedures. Upon review of the Motion and the parties' responsive briefs,[1] for the reasons provided below, we grant CGE's Motion for Reconsideration with respect to the second item above, and remand to the Region to provide a clearer explanation of, or additional factual support for, a nexus between the Facility and the off-site contamination at AOC-1, or, alternatively, to delete the corrective action requirements for AOC-1 from the Final Permit.

Under 40 C.F.R. § 124.19(g), motions for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. *See In re Gary Development Co.*, RCRA (3008) Appeal No. 96-2, at 2 (EAB, Sept. 18, 1996) (Order Denying Motion for Reconsideration);

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[1]On April 3, 2000, U.S. EPA Region 2 (the "Region") filed a response to CGE's Motion. U.S Environmental Protection Agency, Region 2 Response to CGE Motion for Reconsideration ("Region's Response to Motion for Reconsideration"). CGE also moved for leave to file a brief, dated April 14, 2000, responding to the Region's response. *See* CGE Reply to EPA Response to CGE Motion for Reconsideration("CGE Reply"). The Board hereby grants CGE's motion for leave to file its reply.

In re Mayaguez Regional Sewage Treatment Plant, NPDES Appeal No. 92-23, at 2 (EAB, Dec. 17, 1993) (Order Denying Reconsideration and Stay Pending Reconsideration or Appeal). The filing of a motion for reconsideration "should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." *In re Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992). A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider. *See Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citation omitted).

Upon review of the Motion and the parties' responsive briefs, we conclude that much of the Motion consists of arguments or information raised by CGE to the Board for the first time, and further, were otherwise readily ascertainable when CGE originally

sought review of the Region's permit determination. On other issues, CGE merely reiterates arguments raised before and rejected by the Board. These arguments are not grounds for granting reconsideration. However, because of the Region's admission on reconsideration that its explanation of certain matters was "unclear," we grant reconsideration on the sufficiency of a nexus between the Facility and off-site contamination at AOC-1, and remand for further proceedings on this issue.

II. *DISCUSSION*

A. *Corrective Action at Off-site AOCs*

CGE initially contends that the Board misstated the company's position in its Petition for Review ("Petition") by asserting that CGE "conceded or assumed" that the EPA "has authority to regulate an offsite AOC through a permit." Motion at 2. Furthermore, CGE states that the Region erroneously invoked the omnibus clause, RCRA section 3005(c)(3), 42 U.S.C. § 6925(c)(3), to apply corrective action at off-site AOC-1. More specifically, CGE argues that the Agency's authority to address such off-site contamination through a permit is circumscribed by provisions of RCRA section 3004(v), 42 U.S.C. § 6924(v), and its implementing regulations at 40 C.F.R. § 264.101, which CGE

contends restrict the Agency's corrective action authority in the permit context to off-site releases stemming from SWMUs. *Id.* at 3. CGE also asserts that EPA is limited to using corrective action orders under RCRA section 3008(h), 42 U.S.C. § 6928(h), in order to address off-site contamination not linked to specific SWMUs.[2] *Id.* at 5.

In making the above argument, CGE raises for the first time in its motion for reconsideration a new legal theory challenging the Region's authority to address off-site contamination through the omnibus clause. Because the company's challenge on these grounds is untimely, we deny reconsideration of our Order on this basis. Thus, it is immaterial to the outcome of this case whether the Board was correct in stating in its Order that the company "appear[ed] to assume" that the Region had legal authority under the omnibus clause to address off-site contamination so long as there is the requisite nexus between the off-site contamination and the Facility and corrective action is

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[2]In support of this proposition, CGE cites language in RCRA section 3004(v) which states that "pending promulgation of regulations" mandated by this provision, the "Administrator shall issue corrective action orders for facilities referred to in [3004(v)]." RCRA § 3004(v), 42 U.S.C. § 6924(v). CGE notes that while the Agency, pursuant to section 3004(v), has promulgated regulations authorizing corrective action against off-site releases "associated with on-site SWMUs," it has not promulgated comparable regulations applicable to "off-site releases from non-SWMUs." Motion at 3, 5.

necessary to protect human health and the environment. Order at 17 n.21.

Until filing its motion for reconsideration, CGE clearly failed to register a specific objection to the Region's invocation of the omnibus authority to justify corrective action against off-site contamination not linked to specific SWMUs. In its Petition, the company stated that the Region's definition of AOC failed to ensure that corrective action for off-site areas can only be "authorized where the [off-site] contamination 'migrated to the off-site area from the facility.'" Petition at 8 (citing *In re General Electric Co.,* 4 E.A.D. 358, 369 (EAB 1992)). Thus, CGE focused on the existence of a nexus between the "contaminants of concern" and the Facility as a pivotal factor in determining whether corrective action directed against off-site contamination is allowable, Petition at 8, and it complained that EPA had failed to make the necessary finding of migration.[3] CGE's allegations that the Agency lacks the legal authority to address off-site contamination under the omnibus

[3]In its Petition, CGE asserted the Region had also failed to establish a predicate for use of the omnibus clause by not making the finding that corrective action against AOCs designated in the Final Permit was necessary to protect human health and the environment. Petition at 7-8. The issues of nexus and human health and environmental findings were discussed in our decision. *See* Order at 17-18. CGE does not address this point in its Motion.

clause or that such authority is restricted by RCRA section 3004(v) or 3008(h) are new arguments that CGE did not present before.[4]

Accordingly, because CGE did not raise these arguments in its Petition, they are not appropriate for reconsideration. *See Publishers Resource,* 762 F.2d at 561; *see also In re Arizona Municipal Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2-3 (EAB, Aug. 17, 1998) (a petitioner is precluded from raising new arguments or presenting new evidence in a motion for reconsideration); *accord Gary Development* at 3-4; *see also In re Rohm and Haas Co.,* RCRA Appeal No. 98-2, slip op. at 21 n.23 (EAB, Oct. 5, 2000), 9 E.A.D. __ (rejecting review of new issue raised by petitioner because petitioner failed to raise it earlier in petition for review even though it was ascertainable at that time).

Moreover, CGE also failed to preserve its argument for appeal according to the applicable regulations because the issues it raises for the first time in its motion were ascertainable

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[4]It is noteworthy that CGE, in its Petition, challenged -- on other grounds -- the Agency's alleged legal authority to designate AOC-1, but failed to do so based on the scope of the omnibus clause as it relates to off-site contamination. For example, in its Petition, CGE asserted that the Region lacked the legal authority to subject AOC-1 to corrective action based on section 402 of the Clean Water Act. Petition at 8.

during the public comment period leading up to the issuance of the Final Permit. The Region clearly relied upon the omnibus clause when it designated AOC-1 for corrective action in the Draft Permit. *See* Responsiveness Summary at 17, 82 (Draft Permit Conditions I.L.1 & III.A.4). CGE, however, did not contest the Region's use of the omnibus clause in its comments on the Draft Permit. *See* Responsiveness Summary at 18. Thus, CGE has no justification for introducing at this late date the argument that the Region improperly relied upon the omnibus clause to address corrective action for an off-site AOC. As this argument was clearly ascertainable during the comment period, the company cannot raise it now in its motion for reconsideration. *See* 40 C.F.R. § 124.13 ("All persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period * * * .").

For both of the foregoing reasons, we deny reconsideration of our conclusion that the Region can invoke the omnibus clause to address off-site contamination not specifically linked to on-site SWMUs.[5]

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[5]Despite CGE's failure to timely raise the Region's lack of authority under the omnibus clause to impose corrective action on (continued...)

[5](...continued)
off-site contamination allegedly not linked to SWMUs, we did not err in determining that the Region possessed such authority. The legislative history of the 1984 Hazardous and Solid Waste Amendments ("HSWA") to RCRA, which incorporated the omnibus provision into RCRA, states that the purpose of the omnibus provision is to "give the Administrator the authority to add permit terms and conditions *beyond those mandated in regulations, if in the judgment of the of Administrator* such terms and conditions are necessary to protect human health and the environment." Region's Response to Motion for Reconsideration at 8 (citing S. Rep. No. 98-284, at 31 (1983)). The omnibus clause also gives the Administrator the authority to address "special cases and unique circumstances." *Id.*

CGE's argument ignores Congress' rationale for enacting the omnibus clause and, if endorsed, could impose inappropriate restrictions on its potential use. Contrary to CGE's assertion, the omnibus authority would not render RCRA section 3004(v) superfluous since the omnibus authority does not replicate section 3004(v). Section 3004(v) defines the particular set of circumstances in which the Agency is *required* to impose off-site corrective action, either pursuant to regulations or corrective action orders; in contrast, the omnibus clause endows the Agency with *supplemental* authority, to use to address *special cases and unique circumstances* that may not fall within the scope of other statutory provisions. Thus, the two statutory provisions have different purposes, and the case at hand potentially involves such a special circumstance warranting use of the omnibus clause.

Applicable precedent has found that the special function of the omnibus clause -- to enhance the Agency's permitting authority where necessary to protect human health and the environment -- supports Agency corrective action that goes beyond RCRA's specific corrective action mandates. In *In re Morton Int'l, Inc.,* 3 E.A.D. 857, 864 (Adm'r 1992), the Administrator held that the Agency had authority under the omnibus clause to take corrective action in response to releases from *non-SWMUs* despite specific language in RCRA section 3004(u) that requires the Agency to undertake corrective action in response to releases from *SWMUs*. In rejecting the petitioner's argument that the language in section 3004(u) limited the Agency's corrective action authority to releases from SWMUs, the Administrator noted that in light of the purpose of the omnibus clause, the language of section 3004(u) should be regarded as a "mandatory minimum

(continued...)

B. *Region's Authority to Require Corrective Action Pursuant to RCRA section 3004(v)*

In its response to the Motion, the Region avers that in addition to the omnibus clause, RCRA section 3004(v) provides an additional source of legal authority for the corrective action requirements in the Final Permit. The Region further asserts that it cited 3004(v) as a basis for off-site corrective action in the Final Permit. Region's Response to Motion at 5; Final Permit at III-1. The Region then provides in its response to the Motion a detailed discussion of how various SWMUs constituted the "main source of most of the actual and suspected offsite contamination" from the Facility. Region's Response to Motion at 11-18.

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[5](...continued)
requirement that the Agency must fulfill." *Id.* Given the holding in *Morton*, CGE provides no reason why we should not, by analogy, treat section 3004(v) as establishing a mandatory minimum, and thus allow the Region to use its omnibus powers to address off-site AOCs that may not be directly traceable to a SWMU, provided the nexus and human health and environmental necessity requirements are adequately supported in the record. *See also BFGoodrich Co.*, 3 E.A.D. 483, 489 n.12 (Adm'r 1990) (finding that section 3004(u) establishes "minimum corrective action requirements upon RCRA permittees" and consequently does not constrain Agency use of the omnibus clause to address releases from non-SWMUs); 61 Fed. Reg. 19,443 (May 1, 1996) ("In the permitting context, remediation of non-SWMU-related releases may be required under the omnibus authority."); Order at 17 n.21.

During the process that led up to issuance of the Final Permit, insofar as we can tell, the Region relied only upon the omnibus clause in designating AOC-1 for corrective action in the Final Permit and confined its discussion of nexus to the existence of a nexus between off-site contamination and the Facility as a whole rather than to particular SWMUs. *See* Responsiveness Summary at 84-88; Final Permit at I-12, III-8. The mention of 3004(v) in another section of the Final Permit, Condition III.A.1., Final Permit at III-1, without further explanation of its relevance to designating AOC-1 and without discussion of this issue in the Draft Permit, Responsiveness Summary, or Region's brief in response to the Petition, does not provide a sufficient basis for now using this provision as an additional basis for mandating off-site corrective action.

Just as CGE may not raise new issues on reconsideration, neither may the Region cite new legal authorities. Accordingly, if the Region now chooses to rely on some authority other than or in addition to the omnibus clause, it would need to reopen the record for this purpose. Absent this process, it may only rely on the omnibus clause, as it did throughout the permit proceedings up through the issuance of the Order.

C. *Nexus between Facility and AOC-1*

In addition, CGE argues that even allowing for the broadest possible reading of the Agency's omnibus authority, the Region nevertheless failed to provide sufficient factual support for a nexus between the off-site AOC-1 (Rio Mameyes sediments) and the Facility. Motion at 7. CGE avers that the opinion "constitutes a radical departure from the Board's long-held view that, '[t]o justify an exercise of its omnibus authority, [EPA's] finding that a corrective action measure is necessary to protect human health and the environment must have sufficient factual basis in the record.'" *Id.* at 7 (citing *In re Sandoz Pharmaceuticals Corp.,* 4 E.A.D. 75, 81 (EAB 1992)).

The Board's Order held that the Region's sampling results from the Rio Mameyes sediments (AOC-1) provided support for a nexus between the Facility and off-site contamination. This finding, in addition to our finding that AOC-1 presented a human and environmental health threat, supported our determination that corrective action against AOC-1 was appropriate. Order at 20-22. In making our nexus finding, we principally relied upon sample results showing above-background concentrations in a single sample tested for a suite of metals and the contaminant indicators "TOX" and "TOC." *Id.* In addition, in parts of our

decision we observed that the Region, in the record, had identified several potential pathways through which contamination deriving from the Facility could have impacted off-site Rio Mameyes sediments. These included direct discharge of wastewater -- via an outfall -- from the Facility's two waste lagoons to Rio Mameyes, the concrete drainage system, and groundwater. *Id.* at 16, 25.

In challenging the Board's nexus finding on reconsideration, CGE stresses in particular the Region's admission on reconsideration that its explanation of the significance of the "TOX" and "TOC" results in the river sediment sample was "unclear," which, according to the Region, may have prompted the Board to incorrectly conclude that "there was a direct connection between the lagoons and the [sediment sample]." CGE Reply at 3-4; Region's Response to Motion at 21 & n.9.[6] (In our Order, we stated that the TOX and TOC results "provided some further indication of a nexus between the facility and AOC-1," in addition to the above-background metal concentrations which we found "strongly suggest[] that the exceedences are attributable to the Facility.") Order at 21. CGE further states that "EPA

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[6]The Region states that "the sediment sample analytic results from sample location RMR-5 do not, by themselves, directly implicate the lagoons because the sample location is upstream of any logical location for the abandoned outfall from the lagoons." Response to Motion for Reconsideration at 20-21.

now concurs that its data [showing elevated TOX and TOC levels with respect to a background sample] do not support the link between the lagoons and the river sediments." CGE Reply at 4.

In our view, the Region's arguments made prior to the Board's issuance of the Order in connection with TOC and TOX results could be interpreted to mean that contamination migrated directly from the lagoons to the point of sampling via the lagoon's outfall, a proposition that the Region now renounces as illogical. *See supra* note 6; Region's Response to Motion at 21. One could argue that the Region's clarification regarding TOC and TOX should not be overread, since the Region appeared to employ the above indicators not to demonstrate direct migration as described above, but rather to demonstrate migration via *groundwater,* an alternative mode of contamination identified by the Region. On the other hand, the Region's statement that "the elevated TOX and TOC levels from the sediment sample at location RMR-5 do not, by themselves, support a finding of river sediment contamination from the lagoons," Region's Response to Motion at 21, could be interpreted to convey a broader doubt about the value of TOC and TOX for showing any link between the lagoons and the river sediments. The Region's statements thus leave

uncertain what significance, if any, it now wishes to accord the TOX and TOC data.[7]

In light of the Region's qualifications, we find the record to be too unclear to reveal the Region's actual basis for its determination of an adequate nexus between the Facility and AOC-1. Therefore, we remand to the Region so that it may clarify and explain the record, or if necessary, supplement its findings in order to support its nexus argument. *See In re Beckman Production Servs.,* UIC Appeal No. 98-4, slip op. at 14 (EAB, May 14, 1999), 8 E.A.D. ___ (remanding to allow Agency to clarify record where Agency's contradictory statements during public comment period and on appeal left unclear its basis for requiring permit term); *accord In re Austin Powder Co.,* 6 E.A.D. 713, 719 (EAB 1997). In the alternative, the Region could reissue the Final Permit without designating AOC-1 for corrective action. The following specific considerations persuade us to take this course:

- (1) In our Order, we found that both the metals and TOX and TOC concentrations data in a sample of Rio Mameyes sediments

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[7]While the parties' briefs focus in particular on TOC and TOX, the Region's qualifications regarding its sampling data would appear to indicate that the metals concentration data do not demonstrate a direct link between the lagoon, via the lagoon outfall, and the river sediments. *See supra* note 6.

"*collectively* * * * establish[ed] a sufficient nexus between the Facility and alleged contamination" to justify further investigation of AOC-1. Order at 21. Therefore, we relied explicitly on TOX and TOC data to reach our nexus determination, although we clearly accorded greater weight to the metals data than to the TOC and TOX data. *Id.* (Metals data "strongly suggests exceedences are attributable to the Facility"; TOX and TOC data "provide some further indication of a nexus.") In light of the Region's qualifications about the TOX and TOC data, and the fact that these data in part underpinned our nexus finding, this raises the question of the significance to accord to these qualifications.

- (2) In the absence of the TOC and TOX data, the metals concentration data, as well as the contaminant pathways and Facility design information also cited by the Region as grounds for a nexus finding, assume greater importance. While we do not rule out the possibility that this information could support a nexus finding if adequately articulated and explained, a remand proceeding would give the Region the opportunity to do so and give CGE an opportunity to respond to a clearer statement of the Region's basis for proceeding. We are disinclined to make

such findings on reconsideration without affording the parties further process on remand.

- (3) The Final Permit prescribes investigation of, and possible corrective measures against, a large area that encompasses "Rio Mameyes sediments in areas potentially impacted by past releases from the [Facility]." Final Permit at III-8. In our view, the information in the record, as now qualified by the Region's statements about TOC and TOX, does not justify corrective action against an area as sweeping as AOC-1 without further explanation of and/or supplementation of the record.

We note that the Region has throughout this proceeding attributed potential Facility-derived contamination of AOC-1 to a number of pathways including direct discharge of contaminants from the waste lagoons, groundwater, and stormwater. Responsiveness Summary at 87; Region's Response at 10. However, the Region's qualifications about TOC and TOX muddle, if not weaken, its case for groundwater transmission of contaminants, for in its Responsiveness Summary and in its response to the Petition, the Region relied on the TOX and TOC data to demonstrate the viability of a groundwater contamination pathway. *See* Region's Response at 13-14; Responsiveness Summary at 86.

In its Response to the Motion, the Region stresses that above-background concentrations of metals (taken from a sampling point located adjacent to the discharge point of the Concrete Drainage System ("CDS")) indicate direct contamination of the river sediments via the CDS, which drains the Facility's stormwater runoff.[8] Region's Response to Motion for Reconsideration at 21. In its response to the Petition for Review and the Responsiveness Summary, however, the Region made only oblique references to how the sampling data reflected contamination from the CDS. *See* Region's Response to Petition at 12-13; Responsiveness Summary at 85-87. Although we believe that these sampling data may reflect such contamination via the CDS, we are reluctant to use this single sampling point to justify corrective action against AOC-1 as a whole since the CDS discharge point represents only a small portion of AOC-1.[9]

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[8]According to the RCRA Facility Assessment, which forms an important basis for the Final Permit's corrective action requirements, the Facility's CDS "directs surface runoff from both the surrounding maintenance areas and from the plant itself" to the Rio Mameyes. The RFA also states that "[s]urface water runoff enters the CDS trenches from various * * * SWMU areas." U.S. Environmental Protection Agency Region II Response to Petition ("Region's Response to Petition"), App. I at 11 (RCRA Facility Assessment Report ("RFA")) (Aug. 4, 1986)).

[9]We also note that the parties have been unable to locate the outfall leading from the waste lagoon to the Rio Mameyes. *See* Motion at 11; Responsiveness Summary at 85.

In sum, if the Region wishes to impose corrective action on AOC-1, the Region on remand should clarify and clearly explain in the record the basis for demonstrating a sufficient nexus between the Facility and the Rio Mameyes sediments.[10] The Region can do this if it can provide an adequate showing of how the record justifies a nexus finding absent the TOX and TOC data, or by adequately explaining how these data in fact support such a nexus, particularly in reference to the putative groundwater pathway of contamination. Also, the Region is free to augment

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[10]CGE also maintains that the sediment sampling results from the Rio Mameyes do not support designating AOC-1 for corrective action, Motion at 7, because the sampling data from Rio Mameyes sediments are insufficient to establish a reliable background level of contamination. To cast doubt on these data, CGE stresses that the Region used only one background sample point upstream of the Facility as a reference point for the two downstream sediment samples, allegedly rendering the Region's sampling results unreliable. In illustration, CGE claims that a second downstream sample close to the waste lagoons (upon which the Region did not rely to show a nexus) revealed lower levels of metals, TOX, and TOC than either the background sediment sample or the downstream sediment sample relied upon by the Region. *Id*. at 9-10.

CGE makes these objections regarding the insufficiency of sampling data to support a meaningful determination of a "background concentration" for the first time in its Motion. However, the company could have adduced this information in its Petition, since the Region's sampling results formed part of the Administrative Record in this proceeding. Thus, CGE has waived its arguments by failing to raise them in the Petition and public comment period.

While we deny reconsideration, in today's order, of whether the Region has provided sufficient background contamination data to support a nexus finding, we do not by our statements preclude CGE from raising this issue where relevant to the issues to be considered on remand.

its factual findings with regard to AOC-1, as the Region has now been directed to do with respect to AOC-2. *See* Order at 22-23.[11] Alternatively, the Region shall delete the corrective action requirements with respect to AOC-1 from the Final Permit.

D. *Lack of Due Process Protections in Final Permit*

CGE argues that the Final Permit, as written, would fail to ensure the company Constitutional due process in instances that may involve "extraordinarily high financial stakes," and that the Final Permit should therefore be revised to make formal permit modification procedures available to the company. Motion at 11.

Here, CGE challenges issuance of the Final Permit based on a speculative concern that the Final Permit's dispute resolution procedure will not provide sufficient due process protection in such extraordinary cases. *Id.* In upholding the dispute resolution procedure in our Order, we stated that the procedure would protect CGE's due process rights "in most circumstances," Order at 38 n.38, but did not foreclose that there might be

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[11]We note that our Order remanded the Final Permit to the Region to provide more factual support for the nexus between the Honduras Creek sediments and the Facility in order to justify corrective action against AOC-2. Order at 22-23. Nothing in our order today would restrict the Region from likewise providing more information on the nexus between the Facility and the Rio Mameyes (AOC-1), including additional sampling data.

exceptional circumstances in which due process may require the Region to offer more procedural protection than is afforded by the dispute resolution procedures. *Id.* *See also* Order at 36-38.

The Board has previously held that speculative concerns of the kind expressed by CGE do not warrant formal permit review, and accordingly, we will not grant reconsideration here. See *In re GMC Delco Remy,* 7 E.A.D. 136, 167 (EAB 1997). In *Delco Remy,* we held as being too speculative for permit review the permittee's argument that the final permit would violate its due process rights because the final permit did not provide for permit modification procedures in the event of revisions to interim corrective action measures. *Id.* In reaching this determination, we stated that "it would be too speculative to address possible problems in the abstract," since the permittee's rights would "depend on the circumstances and contents" of any such revisions. *Id.* In *In re General Electric Co.,* 4 E.A.D. 615 (EAB 1993), where we analyzed and discussed at length a permittee's due process rights in a context similar to that in the instant case, we stated that although due process may in some situations require greater protection than that afforded in a final permit's dispute resolution process, the existence of such situations "must of necessity" be left for the Region to determine on a "case by case basis". *General Electric,* 4 E.A.D.

at 633. In addition to finding CGE's concerns too hypothetical to merit reconsideration, we will also not "presume in advance that the Region will not honor [CGE's due process] rights should a problem arise." *Delco Remy,* 7 E.A.D. at 167.

Furthermore, we find CGE is incorrect in stating that it would be left with no alternative to the dispute resolution procedure in order to protect its due process rights. Motion at at 12. The Region points out that CGE could refuse to comply and then defend its refusal in a subsequent enforcement proceeding. Region's Response to Motion at 24-25. CGE finds this proposal unattractive and argues that defending its refusal to follow a Final Permit requirement in a subsequent judicial or administrative enforcement proceeding would not be a "practical or Constitutional alternative" because the company would face mounting penalties during the pendency of its defense. Motion at 12 n.8. However, the company would not be limited to a judicial or administrative enforcement proceeding alone to contest a Final Permit obligation. In *General Electric,* 4 E.A.D. at 638, we held that challenging permit conditions in an enforcement proceeding with mounting penalties would not deprive the permittee of its due process rights because the permittee would have the prior opportunity, through a hearing before the Agency, to be informed of and question permit requirements before complying with them.

Since in the case at hand CGE would also have such an opportunity through the Final Permit's dispute resolution procedure, the company would not be deprived of due process by defending its non-compliance in a subsequent enforcement proceeding. In addition, as we stated in *General Electric,* 4 E.A.D. at 638, "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."

Because CGE's arguments concerning its due process rights are speculative, and because the company in any case does not lack options for protecting such rights, reconsideration is denied on this issue.

E. *Imposing Interim Corrective Measures in Final Permit Without Formal Permit Modification Procedures*

Finally, CGE maintains that our determination that the incorporation of ICMs in the Final Permit does not require formal permit modification procedures is in error and in direct conflict with earlier EAB decisions. Motion at 13. In particular, CGE contends that the Board erroneously relied upon a decision allegedly inapposite to this proceeding, *In re General Electric Co.,* 4 E.A.D. 615 (EAB 1993), rather than upon the directly

relevant *In re General Motors Corp., Delco Moraine Div.*, 4 E.A.D. 334 (EAB 1992). CGE contends that the former case, unlike the instant one, involved interim measures (similar to the ICMs in this proceeding) that had already been incorporated into the original permit, and that case addressed whether interim submissions used to implement the interim measures required formal permit modification procedures. CGE notes that, in contrast, the latter case, like the one at hand, involved the incorporation into a final permit of ICMs that had not yet been specified, and that this case required that such interim measures be imposed through formal permit modification procedures. Citing *Delco Moraine,* 4 E.A.D. at 348, the company states that "Agency-initiated modifications to incorporate interim measures must proceed according to the existing modification procedures in 40 C.F.R. § 270.41." Motion at 8.

In our view, CGE's argument lacks merit because it ignores the pivotal difference between *Delco Moraine* and the instant case. Under the terms of the final permit at issue in *Delco Moraine,* the adoption of interim measures would constitute a modification of final permit, in particular the final permit's schedule of compliance. To accomplish this purpose, the final permit directed the Administrator to employ either the formal permit modification procedures at 40 C.F.R. § 270.41 or an

alternative procedure described in the permit. Noting that the regulations at 40 C.F.R. § 270.41 provided a specific mechanism for Agency to initiate such permit changes, we directed the Region to remove the alternative permit modification procedure (that differed from the procedure required by the regulations) from the final permit.

Unlike the situation in *Delco Moraine,* the Final Permit in this case does not direct the Administrator to modify the Final Permit's terms (including the compliance schedule) in order to incorporate potential ICMs. Instead, ICMs are expressly contemplated by and can be automatically incorporated under the Final Permit's original terms. In particular, the Final Permit provides that, "[u]nless otherwise specified, all plans, reports and schedules required by the terms of this permit are incorporated into this permit, upon approval by EPA." Final Permit at I-2, Final Permit Condition I.D. The ICM Plan and ICM design plans that spell out CGE's ICM obligations constitute such "plans" that would be automatically incorporated under the Final Permit's original terms. *See* Final Permit at III-10-III-11. As we held in our Order, "the change in the permit to incorporate the new [ICM] 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 [modification] procedures under 40 C.F.R. part 124." *See* Order at 35; 40 C.F.R. § 270.41. Thus, contrary to CGE's suggestion, determining whether or not a permit change is subject to formal modification procedures at 40 C.F.R. part 124 does not hinge on whether ICMs or, in contrast, subsequent "interim submissions" implementing specified ICMs are to be incorporated into a final permit. Rather, the relevant consideration is whether the change at issue occurs in accordance with the process established in the original permit or instead alters a "fundamental assumption in the original permit." *General Electric,* 4 E.A.D. at 624. The potential incorporation of the ICMs in the instant case does not alter a "fundamental assumption" in the original permit, and thus would not be subject to formal permit modification procedures.

Because CGE has failed to identify a clear error of fact or law with respect to whether the Final Permit must provide for formal permit modification procedures in incorporating ICMs, reconsideration of this issue is denied.

III. *CONCLUSION*

For the reasons stated above, the Final Permit is remanded so that the Region can clarify or supplement the record to

demonstrate a sufficient nexus between AOC-1 and the Facility, thus justifying corrective action against AOC-1 in light of our finding that potential contamination of AOC-1 presents a human health and environmental threat. Alternatively, the Region is directed to remove corrective action provisions pertaining to AOC-1 from the Permit.[12] Unless the Region decides to remove corrective action provisions pertaining to AOC-1 from the Final Permit, *see* Final Permit conditions III.A.4., III.A.5., the Region must accept and respond to public comments on its basis for finding an adequate nexus between the Facility and AOC-1. Any party who participates in the remand process with regard to these permit requirements and is not satisfied with the Region's

[12]Nothing herein is intended to foreclose the Region from using the remand process to demonstrate a nexus between AOC-1 and individual SWMUs pursuant to RCRA section 3004(v) provided that the public is given an opportunity during the remand process to comment on the use of such authority.

decision on remand may file an appeal (limited to these requirements) with the Board pursuant to 40 C.F.R. § 124.19.[13]

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: October 23, 2000

/S/
Kathie A. Stein
Environmental Appeals Judge

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[13]We will not consider in any subsequent appeal issues resolved by our earlier decisions – *e.g.*, that the Region may rely on the omnibus authority as a or the basis for addressing corrective action at off-site AOCs and that the NPDES point source discharge exclusion is inapplicable to these facts.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Reconsideration in Part and Granting Reconsideration in Part in the Matter of Caribe General Electric Products, Inc., RCRA Appeal No. 98-3, were sent to the following persons in the manner indicated:

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Dated: October 23, 2000

/S/
Annette Duncan
Secretary