COMMENTS REGARDING GENERAL PERMIT CONDITIONS

EPA Region IX received many comments about specific Draft Permit Conditions and recommendations for revisions to the Draft Permit Conditions. Where appropriate, the Region incorporated the recommended changes or made its own changes to address specific concerns. Where it disagreed with the commenter, the Region did not incorporate the changes. See the Final Permit in redline format.

Pursuant to 40 CFR § 124.17, the Region is required to make available to the public a response to comments at the time that any final permit decision is issued under 40 CFR §124.15. The response to comments should specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change. It should also briefly describe and respond to all significant comments on the draft permit that were raised during the public comment period, including during any hearing. The Final Permit in redline format also reflects the Region's corrections to typographical, grammatical, and other minor errors in the Draft Permit.

The following responses to comments are organized by Commenter and are identified either by reference to the Permit Modules and its cover sheet or simply by the letter "C" for "comment."

Comments made on the Draft Permit Cover Sheet – CS- Comment #.

Comments made on the Draft Permit Modules – Module # - Comment #.

Other Public Comments – C - Comment #.

References to documents in the Administrative Record include the name of the record file (typically a "pdf" file) in quotes as the document is listed in the Administrative Record for the final Permit. The Administrative Record is available upon request to US EPA Region IX.[1] File names generally start with a date, although there are numerous exceptions.

COVER SHEET:

CS-1. One commenter recommended the deletion of language in the cover of the draft permit that expressed how the Permittees' obligations might extend beyond the life of the permit.

RESPONSE: The Region acknowledges that the fixed term of a RCRA permit is not to exceed ten years in accordance with 40 CFR § 270.50.[2] However, the Region maintains that the specific reference to the Permittees' continued obligations to perform the conditions of the Permit does not contradict this requirement:

[1] For a copy of the Administrative Record, or particular documents identified in these Responses to Comments, or other records identified in EPA's Administrative Record Index published with the final Permit, please contact Mike Zabaneh at Zabaneh.Mahfouz@epa.gov or at (415) 972-3348.

[2] See, also, Guidance on RCRA Permit Renewals, Feb. 2, 2000, RCRA Online Number: 14709 at https://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/786EEFB6524DF83385256ECA00642C3D/$file/14709.pdf.

> "All obligations for performance of the conditions of this Permit are in effect until deemed complete by the Director of the Land Division for the U.S. Environmental Protection Agency, Region 9 (the 'Director')."

Typically, if permittees wish to continue facility operations, they are obligated to submit a permit renewal application in a timely manner in accordance with the conditions of their RCRA permit 40 CFR § 270.30(b). In addition, 40 CFR § 270.51, which refers to the Administrative Procedures Act[3] for its due process requirements, specifies that the conditions continue in full force until the effective date of a new permit.[4]

When the permittees desire to cease operations, they are required to give notice to the permitting authority and implement their closure plan.[5] After closure and any corrective action activities are completed, if applicable, permittees may choose to seek a permit modification in order to shorten the permit term to allow for its earlier termination.[6]

However, if, for whatever reason, a RCRA permit expires before the permittees' obligations – such as the obligation to perform closure of the facility – have been deemed complete, the permittees may not then escape obligations that RCRA imposes for proper closure and corrective action at the facility. See, *e.g.*, RCRA Section 3004(u).[7] This would be especially true where, for example, the permittees themselves secured the premature expiration of the permit by failing to file a timely renewal application.

In its *In re GMC Delco Remy* decision, EPA's Environmental Appeals Board expressed a similar sentiment, as follows:

> "Once the owner or operator of a facility receives a permit for treating, storing or disposing of hazardous waste, it makes no sense to say that the permittee can simply unilaterally abandon ongoing corrective action responsibilities whenever it finds it expedient to discontinue the activities that prompted it to obtain a permit in the first instance. While it may be true in some cases that a permit would no longer be required for the discontinued hazardous waste management activity, the same would not necessarily be true of pending corrective action." 7 E.A.D. 136, at 147-148, (RCRA Appeal No. 95-11, June 1997).[8]

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[3] 5 USC § 558.

[4] 40 C.F.R. § 270.51(b) states that "Permits continued under this section remain fully effective and enforceable."

[5] See 40 CFR § 264.113.

[6] See, *e.g.*, Guidance on RCRA Permit Renewals, referenced above in footnote (fn.) 2.

[7] RCRA Section 3004(u) directs EPA to require owners and operators to take "corrective action for ***all*** releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility . . . regardless of the time at which waste was placed in such unit." 42 USC § 6924(u), (emphasis added). See also 40 CFR § 264.112(d)(3): "If the facility's permit is terminated, or if the facility is otherwise ordered. . . to cease receiving hazardous wastes or to close . . . the owner or operator must close the facility in accordance with the deadlines established in §264.113."

[8] The EAB delves into further detail regarding the legislative history of RCRA's Hazardous and Solid Waste Amendments (HSWA) in examining the issue of ongoing corrective action obligations and the basis for the duty reflected there: "The legislative history of the HSWA makes it clear Congress intended the amendments to subject all RCRA permitted facilities to corrective action regardless of their active status," citing to the House Conference

Another possible scenario where continuing obligations may extend beyond the life of any RCRA permit could be where institutional controls are included as part of any corrective action remedy. See, e.g., Handbook: Implementing Institutional Controls in Indian Country, US EPA Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance, November 2013 at https://www.epa.gov/enforcement/handbook-implementing-institutional-controls-indian-country.

The language to which the commenter objects accurately expresses the Permittees' continuing obligations to complete performance of permit conditions that are not deemed completed upon permit expiration. The Region will not delete the language as suggested by the commenter.

MODULE I:

I-1. One commenter requested clarification of the roles of each of the Permittees in terms of their respective obligations under the Permit and suggested that the Colorado River Indian Tribes as the beneficial landowner not be identified throughout the Permit as a Permittee with operator-related obligations.

RESPONSE: The Region disagrees. Neither RCRA Section 3004 nor the regulations promulgated pursuant to RCRA's hazardous waste provisions distinguish permittees based on whether they are the owner versus the operator. 40 CFR § 270.1(c) requires that both owners and operators of hazardous waste management units have permits during the active life (including the closure period) of the unit. While facility owners and operators may agree between themselves which will be primarily responsible for compliance, and while compliance by one in nearly all cases constitutes compliance by both, the Region will not identify the permittees as anything other than co-equals. The Region will not make changes to the term "Permittees," which appears throughout the final permit.

I-2. One commenter suggested revisions to the draft permit's "permit as a shield" language in draft permit conditions I.A.1. and I.A.4. The commenter asserted that the language in these draft permit conditions does not correctly track the language in 40 CFR § 270.4(a)(1) and did not sufficiently convey the permit shield protection that it believed the Permittees are entitled to. The commenter suggested that the Region incorporate the "permit as a shield" language from a recently-issued draft RCRA permit to another permit applicant (June 2016 draft permit for Envirosafe Services of Ohio, Inc.) (the "Envirosafe Permit").

RESPONSE: The Region made some -- but not all -- of the suggested modifications to Permit conditions I.A.1 and I.A.4. The Region is not obligated to utilize permit language that other Regions have proposed. 40 CFR § 270.4 does not provide a defense to an EPA enforcement action, but rather sets forth the "permit as a shield provision" and its exceptions.

Report, H. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 92 (Oct. 3, 1984), reprinted at 1984 U.S.C.C.A.N. 5649, 5663, and the Senate Report, S. Rep. No. 284, 98th Cong. 1st Sess. 31-32 (Oct. 28, 1983). *GMC Delco Remy*, 7 E.A.D. 136, at 148.

I-3. One commenter requested a change to Draft Permit Condition I.A.5 insofar as: (1) it suggests that the Permit application contained or created requirements; (2) it is interpreted as conflicting with Draft Permit Condition I.A.4; and (3) it creates ambiguity where the Draft Permit Conditions are duplicative and/or internally inconsistent.

RESPONSE: As to whether draft Permit condition I.A.5 suggests the permit application contained or created permit requirements, the Permit application contains and creates requirements that the Facility is obligated to follow, pursuant to the interim status regulations in 40 CFR Part 265, while in interim status. See 40 CFR § 270.72. Numerous attachments and appendices to the draft Permit were originally contained in the Permit application, and the Region incorporated these attachments and appendices into the draft Permit. Once final, the RCRA permit for this Facility and its attachments and appendices will supersede the interim status requirements and any operating conditions that were set forth in the permit application.

The Region identified certain errors requiring corrections and other changes necessitated with respect to some of the Permit attachments and appendices, which are addressed in these Responses to Comments. (See, *e.g.*, the Region's Responses to Public Comments I-36, II-14, and III-7.) Except as explained in the Region's Response to Public Comment II-14 with respect to the Contingency Plan, these errors, omissions, or new conditions will be addressed in revised attachments and appendices to be incorporated into the Permit through appropriate permit modification processes. See Permit Condition I.K. Once these revisions and modifications are completed in accordance with Permit Condition I.K., the revised attachments and appendices will supersede the Permit attachments and appendices that are now made part of the Permit accompanying these Responses to Comments.

As to whether draft Permit condition I.A.5 conflicts with draft Permit condition I.A.4, the Region disagrees, since these Permit conditions have distinct and separate requirements that do not conflict with each other. Permit condition I.A.4 states that the Permit does not shield the Permittees from orders or actions that may be brought under specific RCRA and/or CERCLA authorities and other statutes. Permit condition I.A.5. pertains to how the Permit's requirements, which have incorporated parts of the Permit application as Permit attachments and appendices, supersede the information contained in the application.

The commenter suggested revisions to draft Permit condition I.A.5. that would have basically reduced the condition to a statement that the Permit supersedes the Permit application and that the Permit's attachments, sections or appendices are incorporated into and made a part of the Permit. After considering the draft Permit condition and the commenter's suggested revisions, the Region revised Permit condition I.A.5. to clarify that the Permit, *including its attachments, sections, and appendices*, supersedes the Permit application. The Region has also revised the definition of "Permit Attachment(s), Permit Attachment Section(s) and Permit Attachment Appendix or Appendices" to eliminate the reference to the Permit Application Attachments, Sections, and Appendices. [See Permit condition I.D.]

The Region also retained the language in the draft Permit that references interim status requirements at 40 CFR Part 265 in any Permit attachments, sections or appendices are, where

appropriate, superseded by the Permit requirements at 40 CFR Part 264. The commenter had recommended deleting that sentence. While the Region endeavored to identify and see that any such references to the interim status standards are corrected, it retained the sentence to dispel any doubts that, once the Permit is in effect, the Facility will no longer be managing hazardous waste in accordance with RCRA's interim status requirements, or pursuant to the Permit application, but rather must comply with the Permit's requirements, which are based on the regulations at Part 264.

I-4. One commenter objected to the Region's incorporation of definitions in the draft Permit from 40 CFR Part 61 as creating uncertainty and potential conflicts.

RESPONSE: The Region removed references to 40 CFR Part 61, since those requirements apply to operations at the Facility independent of the Permit. The incorporation of the definitions from Part 61 has also been removed.

I-5. One commenter objected to the Region's incorporation of definitions in the draft Permit from 40 CFR Part 63 as creating uncertainty and potential conflicts.

RESPONSE: The RCRA regulations at 40 CFR 264.600, *et seq.,* authorize the Region to invoke 40 CFR Part 63, where appropriate, for a miscellaneous unit such as RF-2 and its associated equipment. The Region reviewed each of the draft Permit's references to 40 CFR Part 63 and retained the ones it determined ought to be applied to the miscellaneous unit, RF-2.

I-6. One commenter expressed a concern that the definition of the term "facility" in the draft Permit was too broad and exceeded the Agency's authority.

RESPONSE: The Agency revised the definition of the term "facility" to clarify that the scope of the term only extends as far as RCRA's authority will allow. The revised definition tracks the definition of "facility" at 40 CFR Part 270, instead of the definition at 40 CFR Part 260, because Part 270 directly pertains to EPA's hazardous waste permitting program.

I-7. One commenter recommended that the definition of Product be clarified.

RESPONSE: The Region clarified the definition to make clear that regenerated carbon or product is not considered a waste unless it is discarded.

I-8. One commenter recommended that the definition of site be revised to track the regulatory definition.

RESPONSE: The Region revised the definition of site to track the regulatory definition.

I-9. One commenter expressed a concern that the Region had not tracked the regulatory language in draft Permit condition I.E.2. with respect to the timing of the submittal of a renewal application.

RESPONSE: The Region revised Permit condition I.E.2 to reference the regulatory language, which allows for the Director to set a later date for the submittal of the renewal application.

I-10. One commenter expressed a concern that the Region had not tracked the regulatory language in draft Permit condition I.E.3. with respect to continuing the Permit conditions beyond the 10-year lifetime of the Permit when a complete renewal application is submitted in a timely manner.

RESPONSE: The Region revised Permit condition I.E.3 to reflect the regulatory language.

I-11. One commenter expressed a concern that the Region had not tracked the regulatory language in draft Permit condition I.E.8, with respect to EPA's entry and access authority.

RESPONSE: The Region revised Permit condition I.E.8 to reflect the regulatory language, with minor revisions to accommodate the fact that there are two Permittees identified in the final Permit.

I-12. One commenter expressed a concern that part of the language in draft Permit condition I.E.9.a. should not be included in Module I's general conditions but was more appropriate for other sections of the Permit. The commenter pointed out that these specific conditions were also found elsewhere in the draft Permit and recommended their deletion from draft Permit condition I.E.9.a.

RESPONSE: The Region revised Permit condition I.E.9.a. to eliminate the duplicative language.

I-13. One commenter suggested that the record retention provision in draft Permit condition I.E.9.b be clarified so that it clearly excludes the retroactive application of the provision.

RESPONSE: The Region revised Permit condition I.E.9.b to clarify that it only applies prospectively but includes records that RCRA's interim status requirements require to be maintained up until the Permit's effective date.

I-14. One commenter suggested that the Region remove from draft Permit condition I.E.9.b the reference to a 3-year record retention obligation that is inconsistent with the 2-year records retention requirement set forth in Permit Attachment Appendix XXI. The commenter suggested the Permittee did not have fair notice of requirements that the Region will seek to enforce.

RESPONSE: The Region provided fair notice of the applicable 3-year record retention obligation in draft Permit condition I.E.9.b, for which it sought – and the commenter provided – public comment. See also the response above regarding draft Permit condition I.A.5. The Region added language to Permit condition I.E.9.b. to clarify that the 2-year document retention period mentioned in Appendix XXI, which is based on the 40 CFR Part 61, Subpart FF requirements, is excepted from this provision because the Region removed references to 40 CFR Part 61, Subpart FF requirements in general from this Permit. The "see also" reference to Permit condition V.G. in the brackets after the Permit condition has been retained for reference purposes only. See also Permit Condition I.A.7.

In addition, the Region clarified the reference to Permit condition V.G. as an exception to Permit condition I.E.9.b, by referring instead to Permit condition V.G.1., which specifically references the types of documents that must be maintained in the operating record for 5 years. This requirement specifies that certain RF-2 monitoring and inspection data be recorded and the records be placed in the operating record and maintained in the operating record for five years. Five years is an appropriate record-keeping period because the Region is setting a five-year period between trial burns for RF-2. Maintaining such records for this five-year period will ensure the data is available for comparison purposes when needed.

I-15. One commenter recommended revisions to draft Permit condition I.E.9.b to limit records that must be maintained during the course of an unresolved enforcement action.

RESPONSE: The Region did not make the recommended revisions because the requirement at 40 CFR § 264.74(b) pertains to all records and is not limited to specific records.

I-16. One commenter suggested deleting record retention requirements from draft Permit condition I.E.9.b pertaining to groundwater monitoring and groundwater surface elevations.

RESPONSE: Unless and until additional corrective action requirements are imposed or until closure is initiated, the only groundwater related data pertinent to this permitting decision is the groundwater information provided in Permit Attachment Section E and in the Environmental Assessment (EA), as supplemented, that was performed as part of the Bureau of Indian Affairs' ("BIA") decision to approve the lease of tribal trust land to the Facility operator. Maintenance of this information for the life of the Facility should not be a burden to the Permittees. Section E is already part of the Permit and the EA, as supplemented, is a significant document that was a necessary part of the BIA's decision-making process.

While there are no requirements for additional groundwater monitoring to be performed at or around the Facility, Permit condition I.E.9.b was intended to include groundwater monitoring that might be required as part of corrective action or closure activities at the Facility in accordance with 40 CFR Part 264, Subparts F or G. If corrective action or closure activities are initiated during the life of the Permit, record retention requirements will apply in accordance with those subparts.

With respect to maintenance of any additional groundwater surface elevation records, again, there are no requirements to obtain such data. Permit condition I.E.9.b was intended to include groundwater surface elevation data that might be required as part of corrective action at the Facility in accordance with 40 CFR Part 264, Subpart F. See, *e.g.,* 40 CFR § 264.97(f) and Permit condition VI.A.4.

I-17. One commenter objected to a monitoring record requirement in draft Permit condition I.E.9.c that might not apply in all circumstances.

RESPONSE: The Region revised Permit condition I.E.9.c to clarify that it is applicable only where appropriate.

I-18. One commenter objected to draft Permit conditions I.E.10 and I.E.11 insofar as these draft Permit conditions purported to extend beyond EPA's permitting jurisdiction.

RESPONSE: The Region revised Permit conditions I.E.10 and I.E.11 to clarify that the provisions are limited in scope to the extent of EPA's permitting authority under RCRA's hazardous waste provisions.

I-19. One commenter suggested deleting draft Permit condition I.E.10, pointing out that changes in design, operation and maintenance practices at RCRA permitted facilities often require permit modifications. They suggested that the reference to 40 CFR Part 63 standards for changes at facilities subject to the CAA is therefore inappropriate.

RESPONSE: The Region agrees that the reference to the Part 63 standards is not necessary considering other permit conditions that effectively accomplish the same ends. The Region removed this language from Permit condition I.E.10, while retaining the RCRA reporting requirements for planned changes and Permit modifications pursuant to 40 CFR Part 270. See, *e.g.*, Permit conditions I.E.11, and I.E.13.

I-20. One commenter suggested that there is ambiguity in the requirement at 40 CFR § 270.30(l)(1), requiring notice "as soon as possible of any planned physical alterations or additions to the permitted facility," insofar as the permit modification standards at 40 CFR § 270.42 allow for some changes with notice provided at specified times. See draft Permit condition I.E.10.

RESPONSE: The Region agrees that Class 1 permit modifications that do not require EPA's prior written approval are subject to the 7-calendar day notice set forth in 40 CFR § 270.42(a)(1). To the extent that other provisions of the RCRA permit modification procedures might conflict with the standards set forth in 40 CFR § 270.30(l)(1), the Region agrees that the specific notice standards set forth in 40 CFR § 270.42 ought to control over the more general standards set forth in 40 CFR § 270.30(l)(1). Permit condition I.E.10 was revised accordingly.

I-21. One commenter suggested that EPA revise draft Permit condition I.E.12 relating to the transfer of permits to clarify, in accordance with the regulations, that the notification to new owners of the Facility applies during the operating life of the Facility.

RESPONSE: The Region revised Permit condition I.E.12 to track the regulatory language by adding the phrase "during its operating life" to the sentence relating to the providing notice to new owners or operators of the facility. The Region also added language to clarify that changes in operational control or ownership of the Facility are subject to prior Director approval in accordance with 40 CFR § 270.42, Appendix I, as well as language clarifying additional obligations required prior to such a transfer in accordance with 40 CFR § 270.40.

I-22. One commenter suggested that EPA revise draft permit conditions relating to the obligations to provide oral and written notice within 24 hours and 5 days, respectively, of learning of any non-compliance that may endanger human health or the environment. See draft Permit conditions I.E.13.a. and I.E.13.c. The commenter argued that the requirements might subject both CRIT and Evoqua to a duty to act, and a compliance liability, even if one of the parties had no ability to know of facts that give rise to the duty and the liability.

RESPONSE: The Region rejected the suggestion because, when read in conjunction with Permit condition I.A.6, Permit conditions I.E.13.a. and I.E.13.c. make clear that, whichever Permittee first learns of the non-compliance, such Permittee is obligated to provide notice to EPA on behalf of both Permittees and that providing the notice fulfills the obligation of both Permittees.

I-23. One commenter objected to the Region's deviation from the regulatory language at 40 CFR § 270.30(l)(6), which pertains to the obligation to report any noncompliance that may endanger health or the environment. See draft Permit condition I.E.13.a.ii.

RESPONSE: The Region revised Permit condition I.E.13.a.ii. to more closely track the regulatory language. The Region also added the phone number of the National Response Center to Permit condition I.E.13.a. to clarify to whom the verbal notice should be provided. In so doing, the Region re-examined the 24-hour and non-compliance reporting requirements proposed in the draft Permit. And, as a result of that re-examination, the Region revised Permit conditions I.E.13.a. (to add the National Response Center phone number), I.E.13.c. and I.E.15., and to add new Permit conditions I.E.13.d.i. through I.E.13.d.iv. See also the Region's Responses to Public Comments C-39 and C-40.

The Region also determined that the notification of potential endangerments in accordance with Permit condition I.E.13. may require additional follow-up beyond the 5-day notice reflected in draft Permit condition I.E.13.c. As a result, the Region revised Permit condition I.E.13.c. to require that this 5-day written notice be submitted to the Director for approval in accordance with Permit Condition I.G.4., and that it include an assessment about appropriate potential corrective measures. Depending on the approved submittal's conclusions, new Permit condition I.E.13.d. may require that the Permittees undertake a process for developing, implementing and reporting on necessary interim corrective measures as set forth in Module VI. It may also further require, to the extent that the approved Interim Corrective Measures Report so concludes, that the Permittees follow the process set forth in Module VI for developing and implementing a Corrective Measures Study and Corrective Measures Study Final Report and for selecting an appropriate remedy. It further provides for the possibility that the Director will require the Permittees to prepare a RCRA Facility Investigation (RFI) Work Plan in accordance with Permit Conditions VI.E.4. and VI.F.

Permit condition I.E.15. addresses the reporting of non-compliance not otherwise subject to the reporting requirements of Permit Conditions I.E.10 through I.E.14. This reporting obligation would apply when Permit condition I.E.13., among others, does not.

Draft Permit condition I.E.15., tracked the regulatory language at 40 CFR § 270.30(l)(10) pertaining to the reporting of this category of "other" non-compliance. However, the regulatory

language's reference to such reports being due at "the time monitoring reports are submitted" was determined to be vague in the context of permitting this Facility because the referenced "monitoring reports" were not specified in draft Permit condition I.E.15. or elsewhere in the draft Permit.

For this reason, the Region revised Permit condition I.E.15 to require reporting of such other incidents of non-compliance within the meaning of 40 CFR § 270.30(l)(10), within sixty (60) days of the incident. Permit condition I.E.15. also now requires that the information be submitted in a "Report of Non-Compliance" submitted in accordance with Permit condition I.G. It also continues to require that the report contain the information listed in Permit condition I.E.13, but adds language to specify that the reference to Permit condition I.E.13. includes all the information listed in Permit conditions I.E.13.a. and I.E.13.b.

These revisions to Permit condition I.E.15. were deemed appropriate to ensure the clarity of the Permit's various reporting obligations and, specifically, the requirement that the Facility report incidents of non-compliance that might not rise to the level of the type of endangerment to which Permit condition I.E.13. pertains.

A period of sixty (60) days within which to report such "other" instances of non-compliance is a reasonable time to submit the requested information and should be interpreted as sixty (60) days from the time either Permittee first becomes aware of such non-compliance, or by the time a reasonable owner or operator should have become aware of the non-compliance.

By clarifying that the information listed in Permit conditions I.E.13.a. and I.E.13.b. needs to be included in Reports of Non-Compliance under Permit condition I.E.15., the Region is clarifying what such reports must contain. It is important to the Region, for example, that such reports include information regarding whether the noncompliance has been corrected, the anticipated time any non-compliance may be expected to continue, and any steps taken or planned that will reduce, eliminate, and prevent recurrence of the non-compliance.

The Region's interest in these revisions is not to expand the Agency's authority to require reporting of non-compliance, but rather to reasonably proscribe the time and manner for doing so with as little ambiguity as possible. These revisions achieve this goal, while still adhering as closely as possible to the most appropriate and reasonable interpretation of RCRA's statutory and regulatory language, considering all relevant circumstances.

I-24. One commenter objected to the Region's deviation from the regulatory language at 40 CFR § 270.30(l)(11) in draft Permit condition I.E.16. This draft Permit condition relates to the obligation to promptly update information provided to the Director whenever a Permittee becomes aware of a previous omission or error.

RESPONSE: The Region revised Permit condition I.E.16 to track the regulatory language.

I-25. One commenter objected to the requirement that the Permittees maintain an information repository. Nevertheless, this same commenter recommended the Region allow the maintenance of electronic records on an online website instead of requiring the

Permittees to maintain an information repository of hard copy documents. The commenter also recommended that the Region allow electronic submittals in lieu of paper. See draft Permit conditions I.G.1, I.G.2., I.J. and I.K.12.

RESPONSE: The Region revised Permit conditions I.G.1 and I.G.2 and added a new Permit condition I.G.3 to allow for the option of electronic submittals. These revisions also provide for electronic copies of submittals to be sent to the Director of the CRIT Environmental Protection Office. With respect to the requirements of draft Permit conditions I.J. and I.K.12., the Region disagrees with removing the obligation to create an information repository altogether. However, the Region agrees that an electronic information repository is an acceptable means of preserving records pertaining to Facility operations and making them accessible to the public via the internet. Permit condition I.J.1. has been revised accordingly.

Draft Permit condition I.K.12., which is now Permit condition I.K.5., continues to require an information repository be established by Permittees within the timeframe set forth in the schedule of compliance. Notice of this Information Repository, which may be web-based, must be provided to all persons on the Facility mailing list in accordance with 40 CFR § 124.33. However, due to concerns that the transfer of the Facility mailing list to the Permittees might violate the Privacy Act,[9] Permit condition I.K.5.a requires that these notices be mailed to the Director with sufficient postage to enable the Region to affix the addresses and post the notices. These changes were made because the public was not advised over the course of the time that the Facility mailing list was developed that personal mailing addresses, phone numbers, or email addresses would be released outside of EPA.

The Region intends to conduct additional outreach to all those whose personal information is on the Facility mailing list to provide the opportunity to "opt-in" to a Facility mailing list to be provided to the Permittees at a later date. Presumably, this later date will occur after the date by which the notice of the Information Repository must be sent, which is why the Region has revised Permit condition I.K.5. See also the Region's Responses to Public Comments II-14, C-39 and C-40.

I-26. One commenter objected to the language in draft Permit condition I.G.3 that was intended to clarify the way timeframes and deadlines should be calculated under the Permit. The commenter asserted that EPA's attempt to clarify how to undertake these calculations was itself confusing.

RESPONSE: The Region declines to revise draft Permit condition I.G.3., (now renumbered as Permit condition I.G.4.), and disagrees that the provisions are ambiguous or confusing. The provision at Permit condition I.G.4.a., applies when a timeframe under the Permit is scheduled to begin on the occurrence of an act or event. For example, Permit condition II.L.1.b. requires an unmanifested waste report be submitted to the Director within (fifteen) 15 days of receipt of unmanifested waste. Permit condition I.G.4.a. explains that the day after the unmanifested waste is received is the first day to be counted when calculating the 15-day timeframe for submittal of the unmanifested waste report.

[9] The Privacy Act of 1974, 5 USC § 552a, as amended.

Similarly, Permit condition II.N.4. requires written notice to the Director at least (sixty) 60 days before closure of any part of the Facility. Permit condition I.G.4.b. explains that in calculating the deadline for submitting this closure notice, the day before closure begins should be considered day 60.

I-27. One commenter recommended deletion of draft Permit condition I.G.4, arguing that the Region lacks any justification for a requirement to submit MACT reports for a facility category that EPA determined to not be subject to the MACT requirements.

RESPONSE: After reviewing the referenced notification of compliance requirements set forth in the 40 CFR Part 63, Subpart EEE regulations, the Region concluded that draft Permit condition I.G.4 was unnecessary. Notification requirements provided elsewhere in the Permit are sufficient. Draft Permit condition I.G.4 has been deleted.

I-28. One commenter suggested revisions to draft Permit conditions I.G.5, I.G.6, I.G.7, and I.G.8 based on several concerns focused primarily around the question of whether, as written, the draft Permit might compel the Permittees to conduct substantive work that might not be clearly defined or contemplated until well after the Permittees' right to comment on the draft Permit had passed. The commenter asserted that the Permittees might be faced with the possibility of being forced to either comply with an objectionable decision made by EPA, or defend an enforcement action brought by EPA to cure a claimed violation of an obligation in the Permit to implement unilateral modifications and conditions that EPA might issue after the Permit becomes final. Further, the commenter objected to the language in the draft Permit that purported to equate a material defect in a resubmittal with a failure to submit such deliverable in a timely or adequate manner.

RESPONSE: The Region revised Permit conditions I.G.5., I.G.6., I.G.7., and I.G.8. to clarify the Permittees' options in terms of the Region's approvals or disapprovals of submittals. It deleted the references in draft Permit condition I.G.5. to when the dispute resolution provisions of Permit condition I.L. may be invoked, since the Region revised Permit condition I.L. such that it may be invoked whenever there is an unresolved dispute. (See the Region's Response to Public Comment I-40, below.)

The Region also added a reference to Permit condition VI.H.5. in Permit condition I.G.5. Permit Condition VI.H.5. pertains to Emergency Interim Corrective Measures. While the Director's direction to the Permittees regarding implementation of such Emergency Interim Corrective Measures may be subject to the dispute resolution procedures of Permit Condition I.L., the Permittees will nonetheless be required to implement Emergency Interim Corrective Measures, as instructed by the Director, simultaneously during any invocation of dispute resolution under the Permit. Permit Condition VI.H.5. contains one of the Permit's exceptions with respect to a stay of any requirements in dispute pending the outcome of the dispute resolution procedures in accordance with new Permit condition I.L.3. The other is that the Director may disapprove such a stay. (See the Region's Response to Public Comment I-40, below.)

The references to the dispute resolution provisions in Permit condition I.G.7.c. have been left substantially untouched from what was proposed in the Draft Permit, as the information provided in this Permit condition merely explains that the Director's decisions regarding Permit modifications and the like, pursuant to 40 CFR Part 124, are not intended to be subject to the Permit's dispute resolution provisions. The Region's other changes to Permit condition I.L. do not affect this provision.

The commenter noted concern that draft Permit conditions I.G.5. through I.G.8 could violate the Permittees' due process rights by compelling substantive work that has not been clearly defined or susceptible to concrete analysis during the draft Permit's public comment period.

The commenter's concerns are focused on the Permit conditions that provide the Region with authority to modify or disapprove the Permittees' deliverables. Should either of the Permittees disagree with the Region's decision to modify or disapprove a deliverable, the Permittees have the option of invoking the dispute resolution provisions of the Permit. If they are dissatisfied with the results of the dispute resolution process, the Permit – as revised – is silent with respect to any further right to seek adjudication of the dispute. (See the Region's Response to Public Comment I-42, below, rejecting the same commenter's suggestion that the Permit specify that the Division Director's resolution of a dispute constitutes "final agency action" and would, therefore, be subject to judicial appeal.)

The commenter acknowledges EPA Environmental Appeals Board ("EAB") decisions on due process concerns with dispute resolution provisions (citing the following decisions: *In re General Electric*, 4 E.A.D. 615 (EAB 1993); *In re Allied Signal*, 4 E.A.D. 291 (EAB 1994); and *In re Caribe General Electric Products*, 8 E.A.D. 696 (EAB 2000)). But, the commenter rejects these decisions as incorrect, asserting they would not be upheld "if subject to judicial review." See p. 16/202 at "2017 01 06 Comments on Evoqua Draft Permit Decision.pdf."

The Region maintains that the dispute resolution provisions at Permit condition I.L. provide appropriate procedural safeguards to protect the Permittees' due process interests where disagreements regarding the sufficiency of deliverables arise under Permit condition I.G. See *In Re: Allied-Signal, Inc.*, 4 E.A.D. 291, at 297-298 (EAB 1994).

The Region disagrees with the commenter's concern with the condition indicating that a material defect in a resubmittal will be equated with a failure to submit such deliverable in a timely or adequate manner. This condition applies only to resubmittals, where the Permittees would have already been notified of any material defect(s) and would have failed to address such defect(s) in the revised submittal. Such repeatedly inadequate submittals could be equated with failure to submit the deliverable. To the extent that circumstances warrant a different response, the Region will exercise its enforcement discretion to respond appropriately, and the Permittees may invoke the dispute resolution provisions where they disagree. The Permittees may also raise any arguments tending to show why a re-submitted deliverable after notice of material defects in an initial submittal should not be equated with failure to submit the deliverable, in cases where the Agency proceeds with enforcement.

The Region also revised Permit condition I.G.5.d. to clarify that approved submittals need to be maintained in accordance with the Permit's record keeping provisions rather than "in the Operating Record" in order to account for documents that need to be maintained but not necessarily in the Operating Record.

The Region also revised Permit Condition I.G.8. The revision clarifies the Permittees' ability to put into effect or request a permit modification that is governed by 40 CFR § 270.42. The provision is otherwise retained as a guide or suggested process for the orderly administration of this Permit. However, it is not intended to limit the Permittees with respect to their decision as to when it may be appropriate for them to pursue such a modification.

Recommendations regarding appropriate modifications to RF-2's operating conditions based on the PDT results will follow the RCRA permit modification process. This process, although different from the process that units subject to the MACT Subpart EEE requirements must follow, will accomplish the same ends. See also the Region's Response to Public Comment V-39 regarding revisions made to Permit Condition I.G.8 regarding submittal of the PDT reports that may trigger permit modifications.

I-29. One commenter requested that EPA revise draft Permit condition I.H. to add language clarifying that EPA will treat material submitted with a claim of business confidentiality in accordance with 40 CFR Part 2.

RESPONSE: The Region incorporated the commenter's suggested language with respect to Permit condition I.H.

I-30. One commenter indicated that the Permittees should not be required to maintain all the records listed in draft Permit condition I.I.1. for the life of the Facility. The commenter asserted that the Region had not provided sufficient justification in the record to apply records retention requirements that exceed the Part 264 records retention requirements.

RESPONSE: The language that requires records listed in Permit condition I.I.1. to be maintained at the Facility until closure is complete has been revised to also allow for different time periods applicable to specific records. Additional language, for example, has been added to Permit condition I.I.1. to clarify that training records on *former* employees need only be kept for three years from the date the employee last worked at the Facility.

In addition, the retention of the Startup Shutdown and Malfunction Plan at the Facility must be maintained until the completion of closure of RF-2, as opposed to the closure of the Facility. The Region added this qualifier to the records retention requirement in Permit condition I.I.1., relating to the startup shutdown and malfunction plan (Permit Attachment Appendix XXII). This revised language now indicates that the SSMP needs to be maintained at the Facility for the operating life of RF-2. This revised language reflects the records retention period set forth in Permit condition V.C.2.

A number of the records that are the subject of Permit condition I.I.1. have been incorporated as attachments to the Permit and maintaining these records until Facility closure is completed and certified should not be a burden to the Permittees. The Region added a new Permit condition I.I.1.b. to clarify that these records, with the exception of the Contingency Plan, may be maintained in either hardcopy at the Facility or in an electronic format that is accessible as follows. The final Permit now requires that these records be made available or accessible to EPA, CRIT and CRIT EPO for the appropriate period, given the record.

With respect to the commenter's concerns that the Region is extending record keeping requirements beyond EPA's authority, the Region disagrees.

A written Waste Analysis Plan must be kept at the Facility in accordance with 40 CFR § 264.13. In accordance with this requirement, there is no time limit for the retention of a written Waste Analysis Plan. Thus, it must be kept at the Facility ***at all times*** until closure of the Facility is complete.

A written Inspection Schedule must be kept at the Facility in accordance with 40 CFR § 264.15. Thus, a written Inspection Schedule must be kept at the Facility ***at all times***. The Region notes that, in accordance with the Operating Record requirements in Permit condition II.M.1., the actual records and results of inspections (unlike the inspection schedule) need only be kept for three years in accordance with 40 CFR § 264.15(d).

Personnel training documents and records must be kept at the Facility in accordance with 40 CFR § 264.16. The regulation specifically indicates that these records must be maintained at the Facility until closure of the Facility. However, the Region revised Permit condition I.I.1. to acknowledge the regulatory requirement that provides that former employees' records need only be maintained for three years from the date of their last employment at the Facility.

40 CFR § 264.53(a) requires that the Facility maintain a Contingency Plan. Thus, the Contingency Plan must be maintained at the Facility through the Facility's operational life, *i.e.*, until closure is completed and certified. (See Permit Condition II.K.)

While some of the records required as part of an Operating Record need not be maintained until closure of the Facility is completed and certified, the Operating Record itself must be maintained throughout the Facility's operating life. See 40 CFR § 264.73. (See also Permit Condition II.M.1.)

A written Closure Plan must be maintained until closure is completed and certified in order to meet the requirements of the regulation at 40 CFR § 264.112.

Annually adjusted cost estimates for Facility closure must be maintained at the Facility during its operating life in accordance with 40 CFR §§ 264.73(b) and 264.142(d). 40 CFR § 264.73(b)(8) states that this information must be maintained in the operating record until closure of the Facility. This requirement applies to the latest closure cost estimate prepared in

accordance with 40 CFR § 264.142 (a) and (c) and, when this estimate has been adjusted in accordance with 40 CFR § 264.142(b), the latest adjusted closure cost estimate. The Region revised Permit condition I.I.1 to acknowledge the regulatory provision at 40 CFR § 264.73(b).

The Region also revised Permit condition I.I.1. to include the parenthetical reference to Permit condition IV.J.4. Permit condition IV.J.4 is one example of the additional record keeping requirements found in other provisions of the Permit. Pursuant to 40 CFR § 264.196(f) and Permit condition IV.I.1.e, major repairs in tank systems require a certification by a professional engineer before the repaired system may be returned to service. Pursuant to Permit condition IV.J.4 and 40 CFR § 264.196(f), the certification must be placed in the Operating Record and maintained until closure of the Facility.

There are other examples of Permit conditions with additional record keeping requirements that are not listed specifically in I.I.1. These include the corrective action record keeping requirements that have been added to Permit condition VI.B.2. These revisions are discussed in the Module VI section of these responses to comments. Other examples of Permit conditions that specify records retention periods include:

- Permit condition I.E.9.b., which requires the maintenance of groundwater wells and elevations data for the active life of the Facility;
- Permit condition I.J.2., which requires an update of the information repository every 5 years for the life of the Permit;
- Permit condition IV.G.1.c., which requires information relating to the air emissions deferral to CAA controls for tanks and containers under 40 CFR § 264.1080(b)(7) to be kept in the Operating Record for as long as the deferral is being invoked for the unit in accordance with 40 CFR §§ 264.1089(a) and (j);
- Permit condition IV.I.1.e., which requires tank repair certifications be maintained for the life of the system;
- Permit condition V.C.2.d., which requires maintenance of the Startup Shutdown and Malfunction plan for the operating life of RF-2; and
- Permit condition VI.B.2., which requires maintenance of copies of other Module VI-related reports and data until closure of the Facility is completed.

I-31. One commenter opposed the inclusion of records in the information repository required of the Permittees because a draft of Exhibit I, the list of documents to be placed in the repository, was not provided as part of the draft Permit published for public review and comment.

RESPONSE: The following is the list of documents that must be maintained in the information repository in accordance with Permit Condition I.J.1:

1. Final Permit and Attachments;
2. Permit Application, April 2016;
3. Any pending requests for Permit Modifications or Renewal;
4. All Final Permit Modifications;

5. Any Performance Demonstration Test (PDT) Work Plans approved in the preceding 3 years;
6. Any PDT Reports approved in the preceding 3 years;
7. Any Human Health and Ecological Risk Assessment Updates approved in the preceding 3 years; and
8. Final EPA RCRA Inspection Reports for the preceding 3 years.

See Permit Exhibit I.

The final Exhibit I has been published as part of this Final Permit Decision. The documents reflected on Exhibit I are the most basic records relating to the Facility's operations with respect to its RCRA Permit. The Region has taken into account the regulatory language describing the type of information to be included in the repository ("all documents, reports, data, and information deemed necessary by the Director to fulfill the purposes for which the repository is established,"[10]) and the factors to be taken into account in determining whether to impose the obligation to establish such a repository in the first place, (including, "the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record."[11]) Since the Region will allow the Permittees to maintain an electronic, internet-based information repository, the list of documents required to be maintained is not considered to be an undue burden on the Permittees. The Region also added language to Permit condition I.J.2 to clarify that the requirement to maintain the records in the information repository does not affect the time periods for which the records otherwise must be kept in accordance with the Permit.

I-32. One commenter opposed the Region's inclusion of a recurring Performance Demonstration Test and recurring update to the Human Health and Ecological Risk Assessment in the Permit's Compliance Schedule in draft Permit condition I.K. The commenter asserted that these recurring obligations do not qualify as items for a compliance schedule and proposed instead that a Performance Demonstration Test requirement be added to Module V.

RESPONSE: The Region moved the provisions relating to the recurring Performance Demonstration Test to Module V, as suggested. The requirements relating to the update to the Human Health and Ecological Risk Assessment were modified and moved to Module V. See final Permit conditions V.I.1. through V.I.5.

I-33. One commenter opposed the Region's inclusion of the closure of RF-1, the non-operational furnace at the Facility, in the draft Permit's Compliance Schedule in draft Permit condition I.K.6. The commenter asserted that the Facility is in full compliance with the closure standards for such units and that, therefore, the closure provisions should be moved to the Closure Section of the draft Permit (i.e., draft Permit condition II.N.)

[10] See, 40 CFR § 124.33(c).
[11] See, 40 CFR § 124.33(b).

RESPONSE: Regardless of whether the Facility is in compliance with the closure standards applicable to interim status and permitted facilities, the work to be performed in the closure of this non-operational unit must be completed within a year of the effective date of the Permit. While the closure of RF-1 is not a recurring obligation such as a periodic Performance Demonstration Test, or update to the Human Health and Ecological Risk Assessment, there is no difference between the closure obligations for RF-1 under interim status regulations at 40 CFR Part 265 versus the permit regulations at 40 CFR Part 264. The Region removed the requirements from the Compliance Schedule in draft Permit condition I.K. and created a new Permit condition V.H.5.

I-34. One commenter opposed the Region's inclusion of provisions addressing providing Hopper H-1 with secondary containment and performing an integrity examination of H-1 in the Permit's Compliance Schedule in draft Permit condition I.K. The commenter asserted that these obligations do not qualify as items for a compliance schedule and proposed instead that these requirements be added to Module IV, since H-1 is ancillary equipment to hazardous waste tanks T-1, T-2, T-5 and T-6. See Table IV-2.

RESPONSE: The Region moved the provisions (draft Permit conditions I.K.7, I.K.8, and I.K.9) relating to requirements for secondary containment and integrity examination for Hopper H-1, and the possible closure of the unit if the secondary containment is not provided in a timely manner. These provisions are now found in Module IV, as suggested. See Permit conditions IV.F.6.a, and IV.F.6.b.

I-35. One commenter recommended deletion of the provisions in the draft Permit's Compliance Schedule and the Tanks Module (Module IV) that addressed providing secondary containment for Hopper H-1, which is an underground feed hopper that is considered ancillary equipment to the feed tanks T-1, T-2, T-5 and T-6 (draft Permit conditions I.K.7. and IV.F.6.a.) This commenter also recommended deletion of the draft Permit's provisions requiring a leak test for H-1 pending the completion of the installation of the secondary containment (draft Permit conditions I.K.8., I.K.9., and IV.F.6.b.i. through iii). It is unclear whether this commenter was also recommending deletion of the inspection requirements for H-1 pending the secondary containment installation (draft Permit conditions IV.F.6.b.ii).

RESPONSE: See the Region's Response to Public Comment I-34, above, regarding a commenter's opposition to the Region's inclusion of the provisions addressing Hopper H-1's secondary containment in the draft Permit's Compliance Schedule in draft Permit condition I.K. See also Permit conditions IV.F.6.a, and IV.F.6.b.

The regulations applicable to secondary containment, integrity assessments and inspections of ancillary equipment for existing tank systems at permitted hazardous waste facilities are found at 40 CFR §§ 264.191, 264.193, and 264.195.

40 CFR §264.191 requires integrity assessments of existing tank systems, including ancillary equipment, for which secondary containment has not been provided. Pursuant to this

regulatory requirement, the assessment of the system must include each of the factors listed in subparagraphs (b)(1) through (b)(5). Pursuant to 40 CFR §264.191(b)(5)(ii), the assessment for ancillary equipment must include the results of "either a leak test . . . or other integrity examination that is certified by a qualified Professional Engineer in accordance with 270.11(d) of this chapter, that addresses cracks, leaks, corrosion, and erosion."

Draft Permit condition I.K.8., which has been incorporated into draft Permit conditions IV.F.6.b.i. through iii to create the final Permit condition IV.F.6.b.i. through iii, requires the integrity assessment of H-1.

40 CFR § 264.193 requires ancillary equipment, such as H-1, be provided with secondary containment meeting the requirements of 40 CFR §§ 264.193(b) and (c), and includes four specific exceptions. H-1 does not fit within any of the enumerated exceptions, since it is not any of the following: (1) aboveground piping; (2) welded flanges, welded joints, or welded connections; (3) sealless or magnetic coupling pumps or sealless valves; or (4) pressurized aboveground piping systems with automatic shut-off devices. Since H-1 is not one of the enumerated exceptions, it is subject to the secondary containment requirements of 40 CFR § 264.193(b) and (c). (Hence, H-1 is *not* covered by the inspection requirements set forth in 40 CFR §264.195(f), which only apply to the four exceptions listed at 40 CFR §264.193(f)(1) through (4).)

Draft Permit condition I.K.7., which has been incorporated into draft Permit condition IV.F.6.a., to create the final Permit condition IV.F.6.a., requires the installation of secondary containment on H-1.

40 CFR § 264.195(c) requires the daily inspection of: (1) any aboveground portion of H-1 to detect corrosion or releases of waste; and (2) the construction material and area immediately surrounding the accessible portion of H-1 to detect erosion or signs of releases of hazardous waste. However, draft Permit condition II.E., which has been renumbered as Permit condition II.F., requires inspections "as per Permit Attachment Section F and Permit Attachment Appendix XII and […] the requirements of 40 CFR § 264.15." Therefore, the inspection obligations pertaining to H-1 are included in the obligations set forth in Permit condition II.F. (See Permit Attachment Section F at F.3.1.1.1 and Permit Attachment Appendix XII.) Thus, draft Permit condition IV.F.6.b.ii was deleted and replaced with the deadline by which the integrity assessment must be completed. This deadline had previously been found in the Compliance Schedule in draft Permit condition I.K.8.a.

I-36. One commenter objected to draft Permit condition I.K.10. requiring the submittal of a revised Subpart BB Compliance Plan. "Subpart BB" refers to 40 CFR Part 264, Subpart BB, which includes air emission standards for equipment leaks. The commenter claimed EPA failed to include a basis for this requirement in the administrative record.

RESPONSE: The Region disagrees with the commenter's assertion that there was insufficient information in the Administrative Record to support the draft Permit condition I.K.10., which requires the revision and resubmittal of the Facility's Subpart BB Compliance

Plan. The Region maintains that the draft Permit conditions I.K.10.a. through 1.K.10.e. provided specific details regarding the required revisions and notes that additional support for the requirements imposed by RCRA's 40 CFR Part 264, Subpart BB standards is found in the Administrative Record and its Addendum. See, for example: "2016 11 10 Evoqua-CRIT Revised Statement of Basis.pdf" at Appendix B – Checklists, at pp. 196–198/1064; "1991 12 03 RCRA Regs Applicable to Control Devices Required by the OAES - Dec 1991.pdf"; and "2016 09 26 Administrative Record Addendum.pdf," (referring to "October 2000 CAA and RCRA Overlap Provisions in Subparts AA, BB, and CC of 40 CFR Parts 264 and 265, US EPA R4, at "https://trainex.org/web_courses/subpart_x/TopicSearch%20pdf%20files/pdf%20docs%20ABC/Final%20Overlap%20Provisions.pdf "; "52 FR 3748, February 5, 1987"; and "55 FR 25454, June 21, 1990."

The Region is retaining the Compliance Schedule provision requiring the resubmittal of the Facility's Subpart BB Compliance Plan. (See Permit condition I.K.1.) In addition, in responding to the public comment and as explained in more detail below, the Region opted to revise the I.K. Compliance Schedule requirements for the Facility's Subpart BB Compliance Plan, which have been renumbered as Permit conditions I.K.1.a through I.K.1.c. (See also Permit condition IV.F.1.)

Permit Attachment Appendix XIX contains the Facility's Subpart BB Compliance Plan. The Region is not satisfied that the Plan fully addresses the Subpart BB requirements that apply to equipment at the Facility. As a result, the Region is requiring the submittal of a revised Subpart BB Compliance Plan. Regardless of whether the Facility chooses to follow 40 CFR Part 264 Subpart BB or 40 CFR Part 61 Subpart FF, the Permittees will need to revise the Subpart BB Compliance Plan to list the specific pieces of equipment that are subject to Subpart BB. The option to elect to comply with Subpart FF is also discussed below.

Equipment to Which Subpart BB Applies

The applicable definition of "equipment" is found at 40 CFR § 264.1031 by way of the Subpart BB regulation at 40 CFR § 264.1051, (see also 40 CFR §§ 265.1031 and 265.1051):

> "Equipment means each valve, pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, or flange or other connector, and any control devices or systems required by this subpart."

Scope of the "Threshold Exemption"

Permit Attachment Appendix XIX asserts that much of the Facility's "equipment" is exempt from regulation under Subpart BB based on the equipment not coming into contact with or containing hazardous waste with an organic loading of at least 10% by weight, based on language found at 40 CFR § 264.1050(b), which will be referred to here as the "Threshold Exemption."

The Threshold Exemption set forth in 40 CFR § 264.1050(b) does not constitute a complete and absolute exemption from Subpart BB, and some provisions of this subpart apply to all "equipment" at the Facility. Equipment that meets the exemption remains subject, for example, to the requirement at 40 CFR § 264.1064(k) to keep a log in the operating record, including an "up-to-date analysis and the supporting information and data used to determine

whether or not equipment is subject to the requirements in §§264.1052 through 264.1060." (The Region clarified the operating record requirement in Draft Permit Module II by adding clarifying language to Permit condition II.M.1.b.)

In accordance with 40 CFR § 264.1063(d), the Permittees must also make a determination – for each piece of "equipment" at the Facility -- whether or not the equipment contains or contacts a hazardous waste with organic concentration that equals or exceeds 10 percent by weight. And, 40 CFR § 264.1063(d)(3) requires the owner/operator to provide documentation when application of the knowledge of the nature of the hazardous waste stream or the process by which it was produced is used in determining if the Threshold Exemption applies.

The Feed Hoppers

To the extent that a determination has been made for each piece of equipment at the Facility concluding that the Hoppers H-1 and H-2 do not contain or contact hazardous waste with organic concentrations that equal or exceed 10 percent by weight, this conclusion needs to be substantiated further in a revised Appendix XIX. If any hazardous waste is fed into the hoppers during the transfer of spent carbon into the feed tanks prior to mixing with water, these hoppers may in fact be coming into contact with or contain hazardous waste with an organic loading of equal to or more than 10 % by weight. If so, Appendix XIX should be revised accordingly.

Equipment in Contact with Hazardous Waste Emissions

The commenter asserts, and the Subpart BB Compliance Plan supports the operator's claim, that a number of other types or pieces of equipment at the Facility are not subject to Subpart BB requirements because they do not come into contact with or contain hazardous waste but rather gaseous emissions from hazardous waste being managed in other units or equipment. However, the Region disagrees with the commenter's assertions that such equipment does not come into contact with or contain "hazardous waste."

Gaseous emissions of hazardous waste are derived from the spent carbon hazardous waste being managed in the units or equipment that contain or are in contact with the hazardous waste. Because the derivative emissions remain hazardous waste, even after changing phase into a gaseous form, and because these emissions are in contact with or contained in equipment at the Facility, where the emissions exceed 10% by weight organics, the equipment is subject to Subpart BB requirements.

The Definition of Solid Waste as it Pertains to Spent Carbon and its Emissions

The Facility manages spent carbon that constitutes a hazardous waste. The commenter does not disagree with that. What the commenter does disagree with, apparently, is whether the gaseous emissions emanating from the hazardous waste spent carbon managed at the Facility are themselves "hazardous waste." This discussion, therefore, will focus on that question.

The pertinent part of the RCRA statute's definition of "solid waste" is found at Section 1004(27) of RCRA, as follows:

> ". . . any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or ***contained gaseous material*** resulting from industrial, commercial, mining, and agricultural operations, and from community activities. . ." 42 U.S. Code § 6903(27). (Emphasis added.)

For the purposes of identifying the spent carbon and its derivatives, much of the pertinent part of EPA's regulatory definition of solid waste is found at 40 CFR § 261.2.[12] The commenter does not disagree that at least some portion of the waste carbon treated at the Facility constitutes hazardous waste within the meaning of RCRA.[13]

The Region also considers the gaseous emissions that are derivatives of the hazardous waste spent carbon to also be both solid wastes and hazardous wastes. While RCRA limits the Agency's authority to regulate gases as solid waste when they are discarded only when they are "contained gaseous material," the Region maintains that the organic emissions contained within or in contact with this Facility's "equipment," as defined in Subpart BB, are already hazardous waste subject to RCRA regulation *before* the wastes – or parts of the wastes -- enter the gaseous phase. That some of the hazardous waste enters the gaseous phase during management or treatment does not mean that these gases are no longer hazardous waste. Rather, as explained in more detail below, the emissions *remain* hazardous waste. Moreover, EPA's assertion of its authority to regulate the emissions generated as part of a thermal

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[12] Definition of solid waste.
(a)(1) A solid waste is any discarded material that is not excluded under §261.4(a) or that is not excluded by a variance granted under §§260.30 and 260.31 or that is not excluded by a non-waste determination under §§260.30 and 260.34 . . .
(2)(i) A discarded material is any material which is:
(A) Abandoned, as explained in paragraph (b) of this section; or
(B) Recycled, as explained in paragraph (c) of this section; or . . .
(b) Materials are solid waste if they are abandoned by being:
(1) Disposed of; or
(2) Burned or incinerated; or
(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated; or. . .
(c) Materials are solid wastes if they are recycled—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section. . .
. . . (3) Reclaimed. Materials noted with a "-" in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an "*" in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§261.4(a)(17), or 261.4(a)(23), 261.4(a)(24), or 261.4(a)(27). . ."

[13] Some of the spent carbon processed at the Facility is a solid waste because, when it is "recycled," by being "reclaimed," it is considered a "discarded material," assuming it is not excluded under any of the sections listed at 40 CFR § 261.2(a)(1). However, in the Table referenced as "Table 1," and, more specifically, column 3 of Table 1 at 40 CFR § 261.2(c)(3), the Agency has drawn a distinction between the reclamation of spent carbon that is a "sludge" and the reclamation of spent carbon that is a "spent material." For the purposes of 40 CFR §§ 261.2 and 261.6, the terms "spent material," and "sludge," are defined in 40 CFR §§ 261.1(c) and 260.10, respectively. The spent carbon coming to the Facility that is generated from municipal, commercial, or industrial wastewater treatment plants, water supply treatment plants, or air pollution control facilities is considered a "sludge" within the meaning of RCRA's regulatory definition of solid waste. In addition, spent carbon from other types of operations would be considered a "spent material," within the regulatory meaning.

treatment process have been expressly retained over the years, (see, for example, 54 FR 50968 at 50973/2, [Dec. 11, 1989]).

Thus, as discussed in more detail below, the Region disagrees with the commenter's claims that gases coming off hazardous waste being treated at the Facility do not themselves constitute a hazardous waste.

The Definition of Hazardous Waste as it Pertains to the Emissions from Hazardous Spent Carbon Waste Managed at the Facility

The RCRA Air Emissions standards set forth at 40 CFR Part 264, Subpart BB were designed to prevent hazardous waste emissions from hazardous waste management activities from being released to the atmosphere in an uncontrolled manner as fugitive gases. As preventative requirements, they are, by design, applicable to emissions within the carbon regeneration system as a whole.[14] As stated above, as derivatives of the hazardous spent carbon received at the Facility, these emissions remain hazardous waste.

The part of the regulatory definition of hazardous waste pertinent to spent carbon and its derivatives is found at 40 CFR § 261.3. This rule states that a solid waste, as defined at 40 CFR § 261.2, is a hazardous waste if it: (1) is not excluded from regulation as a hazardous waste under 40 CFR § 261.4(b); and (2) meets the specific criteria listed at 40 CFR § 261.3(a)(2).

For solid wastes that are not excluded from regulation as a hazardous waste under 40 CFR § 261.4(b), 40 CFR § 261.3(b) indicates the solid waste "becomes a hazardous waste" when any of the following events occur: (1) in the case of a waste listed in 40 CFR Part 261, Subpart D, when the waste first meets the listing description; (2) in the case of a mixture of solid waste and one or more listed hazardous wastes, when a listed hazardous waste is first added to the solid waste; and (3) in the case of any other waste (including a waste mixture), when the waste exhibits any of the characteristics identified in 40 CFR Part 261, Subpart C.[15]

40 CFR § 261.3(c)(2)(i) indicates that, except as otherwise provided, "any solid waste generated from the treatment, storage, or disposal of a hazardous waste . . .is a hazardous waste. . .." See also *American Chemistry Council v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003) (EPA's interpretation of "hazardous waste" as defined in RCRA validly encompassed derivatives and mixtures of hazardous wastes). Once the spent carbon destined for treatment at the Facility is determined to be a hazardous waste, 40 CFR § 261.3(c)(1) states that, "[u]nless and until it meets the criteria" of 40 CFR § 261.3(d),[16] a "hazardous waste will remain

[14] But, see footnote 18, below, and the Region's Response to Public Comment III-7, where the Region explains its approach to regulating RF-2 under 40 CFR Part 264, Subpart CC, including any of RF-2's "equipment."

[15] The hazardous waste spent carbon received at the Facility became a hazardous waste, for spent materials, when the carbon first met one of the three criteria set forth at 40 CFR § 261.3(b). For hazardous spent carbon received at the Facility that is considered a sludge, however, the carbon will only be considered a hazardous waste at the time it first met one of only two criteria, which are set forth at either 40 CFR §§ 261.3(b)(1) or (2).

[16] 40 CFR §261.3(d) states: "Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:

a hazardous waste."

Without either a rulemaking petition (40 CFR § 260.20), delisting petition (40 CFR § 260.22), or demonstration that the hazardous waste emissions are below the 10% by weight organic concentration threshold for Subpart BB applicability (40 CFR § 264.1050(b)), "equipment" which contains or contacts such emissions must also be addressed in the revised Subpart BB Compliance Plan. (See also 40 CFR § 264.1064(k).)[17] Measurements in the head space of the feed tanks and hoppers or other equipment may be used to determine the percentage by weight organics in the gaseous emissions contained in or contacting specific "equipment."

The Region is steadfast in its conviction that the overall purpose of the RCRA Air Emissions requirements is to ensure that fugitive volatile organic emissions from hazardous waste treatment systems and their equipment are controlled. For example, in the final rule's responses to public comments, EPA specifically refers to the Subpart BB equipment leak standards as controls for "fugitive" emissions. See, *e.g.*, 55 FR 25454 at 25472/3, (June 21, 1990). It is true that the Agency opined on the regulation of gases trapped in the columns of activated carbon units used as air emission control devices for *industrial processes* and found that these would not necessarily be regulated since the "gas originally being treated is not a hazardous waste." See 56 FR 7134 at 7200/2, (February 21,1991). But, the Region determined, where a carbon regeneration unit, such as RF-2, is treating solid or liquid hazardous waste, the gaseous emissions from such solid hazardous waste do in fact remain hazardous waste.

Equipment designed to capture fugitive emissions from other units that manage hazardous waste and equipment designed to convey such emissions to other treatment or control systems as part of overall hazardous waste management activities, cannot be excluded from RCRA's ambit just because the emissions themselves are not in the same form (or phase) as they were when these hazardous wastes were received at the Facility. Instead, the Region maintains that the regulations were in fact intended to include the equipment in which volatile organic emissions from hazardous waste are "contained" or through which they travel and with which they are "in contact" before further treatment, capture, and/or venting to the atmosphere.[18]

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(1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. (However, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of part 268, even if they no longer exhibit a characteristic at the point of land disposal.)
(2) In the case of a waste which is a listed waste under subpart D of this part, contains a waste listed under subpart D of this part or is derived from a waste listed in subpart D of this part, it also has been excluded from paragraph (c) of this section under §§260.20 and 260.22 of this chapter."

[17] The Region is aware of Agency statements in a variety of regulatory preambles that address whether gases are considered a solid waste at the point of generation. See, for example: 47 FR 27520, at 27530/3, (June 24, 1982), and 54 FR 50968, at 50972/3 – 50973/2, (December 11, 1989) (Proposal to List Condensable Light Ends, the RCRA standards do not apply to fume incinerators since the input is not identifiable as a solid waste); and 78 FR 9112, 9128, (Feb. 7, 2013) (CISWI rule).

[18] To the extent that any valve, pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, or flange or other connector, and any control devices or systems required for such equipment pursuant to 40 CFR Part 264, Subpart BB (i.e., "equipment") that is associated with RF-2 comes in contact with or contains hazardous waste (or hazardous waste emissions) with greater than 10% by weight organics, the Region

In addition, the emissions are the same hazardous wastes as managed in the HWMUs, although they have volatilized, (*i.e.,* changed phase due to temperature or atmospheric pressure changes). Because the emissions from the hazardous waste carbon are derived from material that is already considered hazardous waste during management and treatment of that material, the emissions remain hazardous waste. (See 40 CFR § 264.1060).

Subpart BB Compliance Plan Revisions Necessary to Address Equipment in Contact with Hazardous Waste Emissions

There is information in Permit Attachment Appendix XIX that flanges between the spent carbon unloading hoppers and the spent carbon storage tanks and between the spent carbon storage tanks and the furnace feed tank might contain or come in contact with hazardous waste above 10% organics by weight. As a result of this information, the Region is requiring a more thorough explanation of the Subpart BB Compliance Plan's conclusions that other equipment at the facility would not come into contact or contain such hazardous waste (including hazardous waste emissions) above 10% organics by weight.

The Region is also requiring a more thorough basis be included in the revised Subpart BB Compliance Plan for the assertion in the Plan that there are no pumps (or eductors), sampling connection systems, or closed vent systems subject to Subpart BB because, as the existing Plan further claims, equipment is not used for the management of spent activated carbon.

Since the Region considers the feed hoppers at the Facility to be "open ended valves and lines," within the meaning of Subpart BB, the Region maintains that the Hoppers H-1 and H-2 are "equipment" that is potentially subject to Subpart BB. In addition, because the definition of "equipment" includes "any control devices or systems required" by the Subpart BB regulations, the Region also considers the control device equipment, such as Carbon Adsorber WS-2, which manages hazardous waste emissions from these hoppers, as "equipment," also potentially subject to Subpart BB. The revised Subpart BB Compliance Plan should address any such control device equipment or systems that may be required by the Subpart BB requirements, including WS-2.

Similarly, the claim that Subpart BB does not apply to pressure relief devices in gas/vapor service should include a more robust explanation than simply "because the hazardous wastes managed at the Facility are not in gas or vapor form," considering the Region's analysis of the status of the emissions from hazardous waste carbon as hazardous waste. See Section 2.0 of Permit Attachment Appendix XIX.

The Region revised draft Permit condition I.K.10.a (now Permit condition I.K.1.) and deleted draft Permit condition I.K.10.d to remove the references to 40 CFR § 264.1064(m), since the existing Subpart BB Compliance Plan does not reflect an election to comply with the

would not require this equipment to be addressed in the revised Subpart BB Compliance Plan. The Region provided an explanation for its approach to fugitive air emissions that may be associated with the Miscellaneous Unit RF-2 and its associated equipment in the Region's Response to Public Comment III-7, pertaining to the required revisions to the Subpart CC Compliance Plan. Pressure relief devices associated with tanks will be considered as included with their hazardous waste management unit in the Subpart CC Compliance Plan.

CAA regulations by the Permittees.[19] See Permit condition I.K.1. However, to the extent that the Permittees choose and are able to invoke the 40 CFR § 264.1064(m) deferral to CAA requirements for any specific pieces of equipment in the revised Subpart BB Compliance Plan, they are free to do so.

The revised Subpart BB Compliance Plan (and accompanying final Permit Attachment Section N, if appropriate) will require a Class I permit modification with prior Director approval, Class II or Class III permit modification.

I-37. One commenter objected to draft Permit condition I.K.11., requiring that the Permittees add provisions to the Facility's waste analysis plan to address a sulfur waste feed limit and associated sampling requirements. The commenter suggested that the Region include a permit condition requiring the revision of the waste analysis plan thereby avoiding a permit modification for a revised waste analysis plan. The commenter also asserted that the waste analysis plan is not an appropriate document in which to address an annual air emission limit (see Table V-1), which is the only limit the commenter felt was appropriate for controlling sulfur emissions.

RESPONSE: The Region appreciates the commenter's concerns regarding the burden of undertaking a permit modification to incorporate changes to the existing waste analysis plan (WAP). Therefore, the draft Permit condition I.K.11., renumbered as Permit condition I.K.3., has been revised to specify that the anticipated revisions to the waste analysis plan can be implemented pursuant to a Class 1 permit modification with prior Director approval. See Permit condition I.K.3.

The Region revised Permit condition I.K.3. to require the Permittees to revise the WAP to include a recommendation by the Permittees for a feed ***rate*** limit for sulfur in the waste carbon being fed to RF- 2. This feed rate limit, along with the results of the periodic PDTs, will be used by the Permittees to demonstrate to the Region that the sulfur oxides emission limit of 30 tons per year (tpy), the limit expressed in Table V-1 of Module V, is not exceeded.

In accordance with the Facility operator/commenter's September 19, 2016 letter, this demonstration shall be accomplished through a calculation of sulfur emissions using sulfur content of the feed, carbon reactivation production rate, and hours of operation over the course of the year, minus a 90% presumed sulfur removal rate for the packed bed scrubber system. See "2016 09 19 Evoqua Ltr to USEPA R9 re SO2 and NOx Limitations on Emissions.pdf." The Region believes that, given the sulfur emission level data to date, the results of this demonstration will ensure protection of human health and the environment.

I-38. One commenter objected to the time frame for collecting and sending samples for analysis and suggested that it needs to account for weekends, holidays and both shorter and longer months.

RESPONSE: The Region agrees in large part with the commenter and revised draft Permit condition I.K.11.a., renumbered as Permit condition I.K.3.a., to allow for the time frame suggested by the commenter, with some minor revisions to require 4 samples per day every 4-6

[19] 40 CFR § 264.1064 allows facility owners and operators to elect to determine compliance with Subpart BB either by documentation pursuant to 40 CFR § 264.1064, or by documentation of compliance with the regulations at 40 CFR Parts 60, 61, or 63.

hours. This minor revision prevents simultaneous sampling.

I-39. One commenter objected to the requirement that the Permittees resubmit revised personnel training materials as set forth in draft Permit condition I.K.13. The commenter asserted that the imposition of additional training requirements based on the MACT EEE requirements for incinerators were beyond the requirements set forth in the Permit Attachment Appendix XIV and not sufficiently justified.

RESPONSE: The Region reconsidered the requirement that the Permittees resubmit revised personnel training materials as set forth in draft Permit condition I.K.13. Imposing burdensome incinerator training requirements from the MACT EEE standards on the Permittees because RF-2 is a miscellaneous unit is not justified considering the expertise and knowledge of the operator when it comes to operating RF-2, which the Region acknowledges is ***not*** an incinerator. The training requirements of 40 CFR § 264.16, coupled with Permit Attachment Section H and Permit Attachment Appendix XIV, are sufficient to ensure the proper training of Facility personnel. Accordingly, the Region deleted draft Permit condition I.K.13.

I-40. One commenter provided several comments concerning the dispute resolution provision in the draft permit. Among other concerns, this commenter objected to the Permittees having to work with the staff person responsible for the Permit after the provision is triggered. The commenter reasoned that the dispute resolution provision would only be invoked after negotiations with the EPA staff person had already proved fruitless. The commenter also objected to the EPA sending representatives to the dispute resolution meeting. The commenter also suggested changing the person who would ultimately be responsible for resolving disputes from the Division Director level to the Regional Administrator level.

RESPONSE: The Region disagrees that resolution of disputes by Regional staff is improper. See, *e.g.*, *In Re GMC Delco Remy*, 7 E.A.D. 136, at 170 (RCRA Appeal No. 95-11, June 1997).[20] Nonetheless, the Region acknowledges that the commenter's point is susceptible to a relatively easy solution, because there are currently two layers of management between Regional staff and the Land Division Director. The Region determined that disputes could be referred to the mid-level manager prior to any ultimate resolution of the dispute by the Division Director without creating an undue burden on the Region. For this reason, the dispute resolution provision (Permit condition I.L.) has been revised such that, during the initial 14-day dispute resolution period, which is triggered when the Permittees invoke dispute resolution, the Permittees will work to resolve the dispute informally with the *manager* of the RCRA Branch, instead of the EPA staff person.

In addition, the Region kept the Division Director as the individual responsible for resolving disputes rather than the Regional Administrator. The Regional Administrator delegated the authority to perform all actions necessary in connection with hazardous waste permitting. See, 2014 10 10 R9 Delegation RCRA TSD Permits R9-08-006.pdf. The Region believes that

[20] Citing *In re Exxon Co., U.S.A.*, 6 E.A.D. 32 at 44-45 (RCRA Appeal No. 94-8, May 1995); *In re Delco Electronics Corporation*, 5 E.A.D. 475, at 484-86 (RCRA Appeal No. 93-10, September 1994); *In re General Motors Corporation*, 5 E.A.D. 400, at 411 (RCRA Appeal No. 93-5, July 1994); and *In re General Electric Company*, 4 E.A.D. 615, at 639 (RCRA Appeal No. 91-7, April 1993).

keeping the responsibility to resolve disputes with the individual with overall responsibility for the permitting decision is appropriate.

With respect to the commenter's concern about EPA sending its representative to the dispute resolution meeting, the intent of the provision was to allow the ***Permittees*** to send representatives and this has been clarified in the final dispute resolution provisions.

In addition, in response to the numerous recommendations the commenter made throughout the draft Permit for specific provisions to be included within the ambit of the dispute resolution provisions of draft Permit condition I.L., the Region clarified that the Permittees ought to be able to invoke the dispute resolution provisions of the Permit whenever they are unable, after using best efforts and good faith, to resolve a Permit-related dispute with EPA. The Region revised Permit condition I.L. to remove the requirement that the Permit specifically identify each condition potentially subject to dispute resolution. The Region also removed references from the Permit conditions that purported to allow for invocation of dispute resolution, such as draft Permit condition VI.A.7.b.ii, (now Permit condition VI.A.5.b.ii.). The revisions to Permit condition I.L.1., which will allow the Permittees to invoke dispute resolution for any unresolved disputes, render references such as that in Permit condition VI.A.5.b.ii. superfluous.

In addition, while Permit condition I.L.2. has not been changed substantively[21] since the publication of the draft Permit, the Region added a new Permit condition I.L.3. New Permit condition I.L.3. clarifies that, generally, pending the resolution of a dispute, the Permittees may expect a temporary postponement of any relevant deadline for or other obligation to perform the specific requirement that is subject to dispute. But, new Permit condition I.L.3. also makes clear that, where the Director disapproves of the suspension of a requirement or deadline that is the subject of a dispute, the requirement or deadline may continue to apply while the dispute resolution process is ongoing. Likewise, new Permit condition I.L.3. also provides that where the Director directs the Permittees to conduct Emergency Interim Corrective Measures in accordance with Permit condition VI.H.5., the Permittees will need to implement such Emergency Interim Corrective Measures, as instructed by the Director, simultaneously during any such invocation of the Permit's dispute resolution procedures.

I-41. One commenter suggested adding a requirement that EPA include in its final decision, on any matters in dispute, the basis for EPA's decision.

RESPONSE: The Region agrees with the commenter and revised Permit condition I.L.1.c. accordingly.

I-42. One commenter suggested adding a new Permit condition I.L.1.d. to clarify that decisions resolving disputes in accordance with Permit condition I.L. are subject to appeal as final Agency actions. The commenter also suggested the deletion of the language in draft Permit condition I.L.1.c. that stated the resolution of disputes was not subject to administrative or judicial appeals.

RESPONSE: The Region does not agree that the Division Director's resolution of disputes ought to be considered a final agency action that would then be subject to

[21] A minor editorial change to references to "***informal*** dispute resolution" or "IDR" in the draft permit has been made to instead refer simply to "dispute resolution."

administrative or judicial appeal. Rather, the Region maintains that the dispute resolution provisions at Permit condition I.L. provide appropriate and adequate procedural safeguards to protect the Permittees' due process rights, where disagreements between the Permittees and the Region may arise. See *In re: Allied-Signal, Inc.*, 4 E.A.D. 291, 297-298 (RCRA Appeal No. 92-30, May 1994).

In both developing the draft Permit and responding to this comment, the Region evaluated whether the processes and procedures prescribed in the Permit would provide the Permittees with the opportunity to be heard "at a meaningful time and in a meaningful manner." See *Mathews v. Eldridge*, 424 US 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 [1965] and *Grannis v. Ordean*, 234 U.S. 385, 394 [1914]). Such an analysis generally requires consideration of: (1) the private interests potentially affected; (2) the risk that the private interests may be deprived compared to the value of additional procedural safeguards; and (3) the burden on the government or the public imposed by such additional safeguards. *Matthews, 424 U.S.* at 334-347.

The Region understands the commenter's concern that unilateral modifications to workplans or other deliverables by the Region might result in significant expenditures or costs to the operator to which it had not agreed. However, the Supreme Court determined that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." Id. at 348. The financial interests of the operator must be considered in light of the government's interests, and hence the public's interests, in conserving "scarce fiscal and administrative resources." Id.

The Region also considered that there may be potentially significant costs to the Permittees based on resolutions of possible disputes, although such disputes are currently purely hypothetical. The Region considered further how to weigh potential and, at this stage at least, hypothetical costs to the operator against both the public's and the federal government's interests in the efficient use of Agency resources. To allow a Permittee to pursue administrative or judicial review of the Land Division Director's resolution of any dispute that may arise could potentially severely limit the government's administration of the Permit. Judicial and administrative review will typically cause significant delays to the implementation of critical Permit requirements.

On the other hand, where there are changes to the Permit or its attachments or appendices, such changes will necessarily be put into effect through the permit modification process, which does allow for review of the Region's permit decisions. However, immediate recourse to review by an administrative or judicial body is inappropriate where no permit modification occurs – such as where a deliverable is disapproved or modified. The Permittees may invoke the dispute resolution provision and be heard by the same individual who would make permitting decisions. The Region regards these protections as sufficient to protect the due process rights of the Permittees while not simultaneously over-burdening the Agency or putting the public at risk.

Although the Region declines to add a new Permit condition I.L.1.d. indicating the Director's resolution of a dispute would be a final agency action, as suggested by the commenter, the Region nonetheless deleted the language from draft Permit condition I.L.1.c. that indicated the resolution of disputes would ***not*** be subject to administrative or judicial appeal.

The Region disagrees with the commenter's conjecture that the EAB decisions from *In re General Electric*,[22] *In re Allied Signal*,[23] and *In re Caribe General Electric Products*,[24] "would not be upheld if subject to judicial review."[25] However, the Region also endeavors to ensure that it does not make it more difficult for a Permittee to exercise its constitutional rights by including language in its permits that could be interpreted as foreclosing any due process options that might otherwise be available to the Permittees. With this philosophy in mind, the Region revised Permit condition I.L.1.c. rendering the permit silent on the question of whether the resolution of a dispute constitutes a "final agency action."

[22] 4 E.A.D. 615 (RCRA Appeal No. 91-7, April 1993).
[23] 4 E.A.D. 291 (RCRA Appeal No. 92-30, May 1994).
[24] 8 E.A.D. 696 (RCRA Appeal No. 98-3, February 2000).
[25] See p. 16/202 at "2017 01 06 Comments of Evoqua Draft Permit Decision.pdf."