IN RE GENERAL MOTORS CORPORATION, INLAND FISHER GUIDE DIVISION

RCRA Appeal No. 93-5

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided July 11, 1994

Syllabus

General Motors Corporation (GMC) seeks review of a final permit decision issued to its Inland Fisher Guide Division by EPA Region V under the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.* In its petition for review, GMC challenges the HSWA permit's designation of five "solid waste management units" at the Inland Fisher Guide Division's manufacturing facility in Anderson, Indiana. The petition also raises objections concerning: (1) a permit provision that would require notice to EPA of "any planned physical alterations or additions" to the permitted facility; (2) the lack of any dispute resolution provision in this permit to enable GMC to challenge future decisions affecting the scope of investigative work required at the facility; (3) the lack of any permit provision expressly acknowledging the Region's obligation to "split samples" with GMC; (4) a permit provision that, according to GMC, would improperly expand EPA's permit modification authority beyond the limits established by regulation; and (5) the absence of permit terms explicitly stating that EPA will (i) administer the permit reasonably, (ii) notify GMC of any extension of the record-retention period under 40 C.F.R. § 270.30(j)(2) only in writing, and (iii) impose corrective action requirements for newly discovered solid waste management units or newly discovered releases only for purposes of protecting human health and the environment.

Held: The five solid waste management unit designations challenged by GMC are upheld. For each designated unit, the Region has identified adequate record evidence showing either that the unit is one in which "solid wastes have been placed," or that the area is one at which "solid wastes have been routinely and systematically released," or both.

The permit is remanded for incorporation of revised permit conditions that will address four of GMC's five remaining objections, in accordance with commitments made by the Region in its briefs. GMC's objection based on the alleged lack of sufficiently explicit standards of reasonableness is rejected, except to the extent that Region V has agreed to include the requested permit language to conform to the language of an underlying regulation. Also rejected as grounds for review are GMC's objections seeking explicit statements that the applicable record-retention period will be extended only in writing, and that corrective action for newly discovered SWMUs and releases will be required only for protection of human health and the environment.

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

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

The Inland Fisher Guide Division of General Motors Corporation (GMC) produces automobile components at a 234-acre manufacturing facility in Anderson, Indiana. On December 31, 1992, EPA Region V issued a permit for the Anderson facility pursuant to the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* (RCRA).[1] The HSWA permit sets forth initial corrective action requirements for seven solid waste management units (SWMUs) at the facility. For six of the designated SWMUs, the permit calls for performance of a RCRA Facility Investigation to evaluate the extent of any releases to the soil of hazardous wastes and/or hazardous constituents; for the seventh, the permit requires only that GMC "submit any available information regarding any possible contamination of the soil" within ninety days after the effective date of the permit.[2]

On appeal, GMC challenges five of the permit's seven SWMU designations. In addition, GMC raises objections to certain terms of the Region's permit decision, challenging: (1) a permit provision that would require notice to EPA of "any planned physical alterations or additions" to the Anderson facility; (2) the absence of any dispute resolution mechanism through which GMC might contest future decisions regarding the investigation needed at this facility; (3) the absence of any permit language acknowledging the Region's obligation to "split samples" with GMC; (4) a permit provision that, in GMC's view, gives EPA the authority to modify the permit unilaterally without regard to the modification requirements of 40 C.F.R. § 270.41; and (5) the lack of sufficiently explicit permit language reflecting how the Region intends to administer the permit, including language committing the Region to implement the permit in a "reasonable" manner.

At the Environmental Appeals Board's request, Region V filed a response to the petition for review on April 29, 1993. In addition, with leave of the Board, GMC filed a reply brief in support of its petition on

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

[2] According to Region V, the "available information" to which the permit refers is any information in the facility files relating to the SWMU in question. *See* Region V Response to Comments at 5.

June 15, 1993, and the Region submitted a response to the reply brief on July 9, 1993. During the course of the briefing, the parties succeeded in narrowing the scope of their dispute in certain respects. Thus, as discussed in Sections II.B through II.F of this opinion, several provisions of the permit will be remanded to Region V for implementation of revisions proposed by the Region during the pendency of the appeal. As to the propriety of the Region's designation of solid waste management units, however, we conclude in Section II.A that the designations reflect no clear error of fact or law or policy issue or exercise of discretion warranting review. Accordingly, the petition for review as to those designations must be denied.

II. *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to § 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level." *Id.* The petitioner bears the burden of demonstrating that review is warranted. *See, e.g., In re Environmental Waste Control, Inc.*, RCRA Appeal No. 92-39, at 3-4 (EAB, May 13, 1994); *In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 4 (EAB, Nov. 23, 1993).

A. *SWMU Designations*

1. *"West Used Oil Area"*

The permit identifies a used oil management area on the western portion of the Anderson facility as a solid waste management unit (SWMU No. 16) for which a RCRA Facility Investigation must be performed. According to the RCRA Facility Assessment Report prepared for the facility by the Indiana Department of Environmental Management, this unit includes a wall pipe used for unloading clean oil, an industrial truck garage in which drums of used oil are emptied, an oil skimmer pit in which used oil is separated from water, and a ten-thousand-gallon used oil storage tank. RFA Report at 29 (February 28, 1992).[3] The RFA Report further states:

> Considerable oil stained soil exists around the wall pipe and the oil skimmer pit. An RFI in this area is recom-

[3] According to GMC, this unit also includes a virgin oil storage tank. GMC Comments on the Draft Permit at 3 (June 23, 1992).

> mended based on the condition of the unit and the amount of spilled oil. [*Id.*]

GMC itself characterizes the used oil area as "a possible oil contamination site" (GMC Comments on the Draft Permit at 6), and does not dispute the site inspectors' reported observation of "considerable" staining of the soil in this area. GMC objects, however, that it "is already addressing this area under the approved state Underground Storage Tank regulations * * * and should not be subject to potentially duplicative or inconsistent requirements pursuant to the HSWA." Petition for Review at 10.

GMC's objection does not provide a basis for review. As we have repeatedly held, "concerns over the possibility of future corrective action obligations that might duplicate work already performed pursuant to State-law requirements * * * do not require that we review or invalidate a HSWA permit." *In re Allied-Signal Inc. (Elizabeth, NJ)*, RCRA Appeal No. 92-30, at 6 (EAB, May 16, 1994). *See In re Metalworking Lubricants Co.*, RCRA Appeal No. 93-4, at 6 (EAB, March 21, 1994); *In re Beazer East, Inc.*, RCRA Appeal No. 91-25, at 9-10 (EAB, March 18, 1993); *In re General Motors Corporation, Delco Moraine Division*, RCRA Appeal Nos. 90-24 & 90-25, at 8-9 (EAB, Nov. 6, 1992) ("*GMC Delco Moraine*"). Here, the Region disclaims any intention to require "unnecessary or duplicative remediation at this area," and states that it fully intends to "consider data generated by GMC's proposed underground storage tank investigation as long as the sampling and analysis conforms to the methodology set forth in the approved RFI Work Plan." Response to Petition for Review at 13-14.[4] The Region's response adequately addresses GMC's concern over its obligations regarding the west used oil area, and we therefore deny GMC's petition for review insofar as it pertains to SWMU No. 16.

2. *"Conrail Ditch Area"*

The permit identifies a ditch area alongside the railroad spur at the south end of the facility as a solid waste management unit (SWMU No. 17) for which a RCRA Facility Investigation is required. The RFA

[4] GMC professes concern that, despite the Region's stated intention to consider work already performed by GMC at the used oil area pursuant to State regulations, the Region will nonetheless disregard that work and impose "boilerplate" corrective action requirements that fail to "respond to the site-specific facts." GMC Reply Brief in Support of Petition for Review at 12. But the Region has not yet been presented with any "site-specific facts" upon which to act in relation to the used oil area, and no RFI work plan for the area has yet been proposed. Only after GMC submits the specific information on which it seeks to rely can the Region exercise its "responsibility to determine whether GMC's [non-HSWA] remediation efforts are consistent with * * * the standards imposed by HSWA." *GMC Delco Moraine*, at 13. If the Region should ultimately conclude that the work done on this SWMU under the State's regulatory program is inadequate for HSWA purposes and that more is required, GMC can invoke the dispute resolution mechanism that the Region has agreed to adopt on remand.

Report states that unlined roll-off containers were stored on a sloped surface adjacent to this ditch beginning in the mid-1970s; that liquids have "leaked out of the roll-off [containers] and into the ditch area"; and that, upon inspection, "[t]he sloped area showed evidence of erosion." The RFA Report further states, on the basis of information provided by GMC, that the roll-offs stored in this area "held paint sludge, trash, or plating sludge." Finally, the RFA Report notes that in 1985, State regulators responded to a complaint from a GMC employee concerning alleged releases into the ditch.[5] Based on these considerations, the Report concludes that "[a]n RFI is recommended for this unit." RFA Report at 30.

GMC now contends that "[t]he Conrail Ditch area is not correctly designated a SWMU under Section 3004(u)" (Petition for Review at 10) because (1) GMC did not, in fact, store any plating sludge in this area; and (2) the solid wastes (paint sludge and burnable trash) that GMC did store in this area were non-hazardous. Specifically, GMC argues:

> There is no evidence that plating sludge was handled at the Conrail Ditch. The paint sludge previously stored at this area was non-hazardous as was the burnable trash. There is absolutely no evidence of a systematic release in this area.

Id. at 11. In addition, GMC states that it has analyzed three soil samples from the Conrail ditch area since the Region issued its final permit decision, and that those samples were found to contain certain hazardous constituents[6] only in concentrations below the "action levels" that would trigger a Corrective Measures Study under EPA's proposed Subpart S regulations (*see* 55 Fed. Reg. 30,798 (July 27, 1990)).

Initially, we note that we cannot accept GMC's apparent assumption that a permittee may effectively preempt the listing of a SWMU by performing an unapproved sampling procedure that it then unilaterally declares to be an adequate substitute for an approved RCRA Facility Investigation. If a solid waste management unit is otherwise properly designated in a final HSWA permit, that designation is not thereafter subject to

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[5] The record before us includes a copy of a "State Board of Health" memorandum dated March 20, 1985, in which the employee's complaint is said to have concerned "paint sludge and hazardous chemicals being pumped and washed off the southside [sic] of the plant property into a drainage ditch near the Conrail Railroad right-of-way." Response to Petition, Exh. E at 1.

[6] The test report submitted by GMC states that the soil samples "were analyzed for Volatile Organic Contaminants (VOCs), barium, chromium, copper, lead, nickel, silver, and zinc," and that these particular analytes "were selected based on historical land use in the area." Petition for Review, Exh. C.

challenge on appeal on the basis of post-permit information developed by the permittee. The permit itself provides a mechanism for dealing with additional information.[7] To accept GMC's argument would be to invite unlimited attempts by permittees to reopen and supplement the administrative record after the period for submission of comments has expired. This we decline to do. *See* 40 C.F.R. § 124.13 (setting forth permit applicant's obligation to "raise all reasonably ascertainable issues and submit all reasonably available arguments" in opposition to proposed permit conditions "by the close of the public comment period"). We therefore disregard, for purposes of this appeal, the soil tests conducted by GMC with respect to the Conrail ditch area after the date of the Region's final permit decision.

Instead, our inquiry must focus on the objections that were timely presented by GMC in response to the Region's designation of this unit as a SWMU.[8] The question properly before us concerns whether Region V clearly erred by declining to withdraw its designation of the Conrail ditch area as a SWMU upon receipt of those objections.[9] As noted above, GMC contends in its petition that the Region's SWMU designation was clearly erroneous for two reasons: because only non-hazardous waste was stored in the ditch area, and because there is no evidence that a "systematic release" occurred in the area.

EPA's proposed Subpart S regulations define "solid waste management unit" as:

> any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

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[7] The GMC permit provides, for example, that "[a]fter completion of and based on the results of the RFI and other relevant information, the Permittee may submit an application to the Regional Administrator for a Class 3 permit modification under 40 C.F.R. 270.42(c) to terminate the Corrective Action tasks of the Schedule of Compliance. * * *. This permit modification must conclusively demonstrate that there are no releases of hazardous waste(s) including hazardous constituents, from SWMUs at the facility that pose a threat to human health and the environment." Permit § III.F.3.a.

[8] *See* GMC Comments on the Draft Permit at 6 ("The roll-off containers stored at this location contained only paint sludge and a small percentage of burnable trash, such as craft paper. Only non-hazardous waste was stored at this location. We do not believe that plating sludge was stored in this location * * *.").

[9] It is apparently undisputed that, based on the information originally provided to the State of Indiana by GMC indicating that plating sludge—a listed hazardous waste under RCRA—was stored in the Conrail ditch area, the area would properly be characterized as a solid waste management unit. However, GMC now contends that this information was erroneous.

55 Fed. Reg. at 30,874.[10] That definition does not, as GMC suggests, require EPA to demonstrate that a particular unit was used for storage of *hazardous* wastes before designating the unit as a SWMU. To the contrary, although the definition acknowledges the distinction between solid waste and hazardous waste ("irrespective of whether the unit was intended for the management of solid or hazardous waste") it refers only to "solid waste" when identifying the material placed at or released from a potential SWMU. And the proposed Subpart S definition requires only the "placement" of solid waste at a particular unit to support designation of the unit as a SWMU; the definition does not, as GMC suggests, require both the placement of waste and the occurrence of routine and systematic releases of that waste. (While the second sentence in the definition does refer to releases, that sentence serves to extend the definition of SWMU to areas not meeting the test of "any discernible unit at which solid wastes have been placed" as stated in the first sentence, and in no way limits the scope of the first sentence.)[11] As previously noted, GMC concedes that it stored solid waste at this site and thus the Conrail ditch area fits squarely within the first sentence of the SWMU definition.

In any event, contrary to GMC's contention, the record does include ample evidence from which Region V could reasonably conclude that hazardous wastes were stored in the area adjacent to the Conrail ditch. The report summarizing Indiana's 1985 complaint investigation refers to the ditch area as a "hazardous waste storage area" that was "paved on an incline which would allow run-off to drain to this * * * ditch." The report also states that a GMC engineer at the site (who was not the complaining employee) "noted the leakage of the hopper and possible run-off from the chemical storage area." Further, the report states that "all chemicals were stored at the above mentioned area" until December 25, 1984, at which time the chemicals were moved to what the report describes as a "new hazardous waste storage building." Response to Petition, Exh. E. These references—

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[10] The Board has previously found this definition to be "consistent with both the statutory definition of 'solid waste management' and the legislative history concerning units intended for regulation under RCRA § 3004(u)." *GMC Delco Moraine*, at 5; *Environmental Waste Control*, at 16 n.9. Although the Subpart S proposal does not have the force of law, and although permit provisions based on the proposal are "open to attack in any particular case," *GMC Delco Moraine*, at 11 n.15, GMC has not challenged (and indeed has encouraged) the use of the proposed Subpart S definition for evaluating the SWMU designations at issue in this appeal.

[11] This interpretation is confirmed by the preamble to the proposed Subpart S rule. The preamble includes a discussion of what constitutes a "discernible unit" under the SWMU definition and then goes on to state that "[t]he proposed definition [of a SWMU] *also* includes as a type of solid waste management unit those areas of a facility at which solid wastes have been released in a routine and systematic manner." 55 Fed. Reg. at 30,808 (emphasis added).

which have not been addressed or acknowledged by GMC either in its comments to the Region or in its briefs on appeal—imply that a variety of chemical wastes, including hazardous wastes, may have been stored in the area adjacent to the Conrail ditch, at least on an interim basis. Accordingly, even if the Region were required to justify its SWMU designation based on evidence of *hazardous* waste storage, that designation is adequately supported by the various references to such storage in the 1985 investigative report. For these reasons, the Region's designation of the Conrail ditch area as a SWMU is not clearly erroneous and review of that designation is unwarranted.[12]

3. *"Area Northeast of the East Container Storage Building"*

This area, which has been designated in the HSWA permit as a solid waste management unit (SWMU No. 22) for which an RFI is required, was previously the subject of a Notice of Violation and an agreed order issued by the Indiana Department of Environmental Management. The State required GMC to perform a site assessment that would, according to the site assessment plan, "determine the nature and lateral and vertical extent of contamination of a visibly discolored area of gravel." In the August 1989 site assessment plan, the "dark oily discoloration" in this area is attributed to GMC's practice of transferring "accumulated waste collected from trenching around hydraulic equipment" from a container into 55-gallon drums:

Substances stored in the storage area north of the East Container Storage Building include:

- hydraulic oil
- antifreeze
- polyol
- diisocyanate
- "polygrip" adhesive

[12] The Administrator has previously observed that, although EPA's corrective action authority under RCRA § 3004(u) applies only to "releases of hazardous waste or constituents," that limitation "does not preclude the Agency * * * from requiring a permittee to identify and evaluate *all SWMUs* as a first step in determining the extent to which corrective action is required." *In re Hoechst Celanese Corporation*, RCRA Appeal No. 87-13, at 11 n.10 (Adm'r, Feb. 28, 1989) (emphasis added). The Region, therefore, can properly require GMC to undertake preliminary investigative measures for any "solid waste management unit," even without evidence linking a particular unit to the release of "hazardous" waste or constituents. If it should become apparent that no release of hazardous waste or constituents has occurred, there would then be no basis for proceeding to require corrective action under Section 3004(u).

> In the past, a waste collection container was located in the vicinity of the discolored area. This container was used to accumulate waste collected from trenching around hydraulic equipment in the plant. When full, the container was raised and emptied into 55-gallon drums for shipment. This transfer operation is the most likely source of the discolored gravel in the storage area.

Response to Petition for Review, Exh. G at 2. *See also* RFA Report at 35.

GMC asserts that the designation of this area as a SWMU is improper because "[t]here is no evidence of a systematic release at this location," and that, in any event, no further investigation should be required because GMC has already performed a site assessment at the State's behest. Petition for Review at 12. We disagree with both arguments.

The proposed Subpart S definition of solid waste management unit, on which GMC here seeks to rely, requires no showing of a release if the proposed SWMU is a "discernible unit at which solid wastes have been placed at any time." 55 Fed. Reg. at 30,874. It is undisputed that the area designated as SWMU No. 22 was used for waste storage. In its comments on the draft permit, GMC did not challenge the RFA Report's finding that various waste materials (hydraulic oil, antifreeze, etc.) had been stored in the area, but argued only that the site assessment had resulted in an "independent clean bill" for the storage area and that GMC "do[es] not believe that there remains an environmental risk." GMC Comments on the Draft Permit at 7.[13] Accordingly, we reject the contention that SWMU No. 22 was improperly designated for lack of sufficient evidence of a "systematic release."

In response to GMC's alternative contention that the State-ordered site assessment suffices to "prove that this area is not a SWMU," Petition for Review at 13, the Region states that it remains unconvinced because the site assessment only involved an analysis of the soil to a

[13] On appeal, GMC seeks to argue that the area designated as SWMU No. 22 is not a "discernible unit." GMC Reply Brief at 17. The basis for that argument is not entirely clear, although it appears that the argument relies at least in part on the fact that waste is no longer stored in the area of the proposed SWMU. In any event, the contention that Region V's designation of SWMU No. 22 is invalid because the proposed SWMU is not a "discernible unit" was not raised in GMC's comments and therefore was not properly preserved for review in accordance with 40 C.F.R. §§ 124.13 and 124.19. 40 C.F.R. § 124.13 states that persons objecting to any provision contained in a draft permit "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. § 124.19(a) requires "a demonstration that any issues being raised [on appeal] were raised during the public comment period." *See, e.g., In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 25; *GMC Delco Moraine*, at 7.

depth of six inches.[14] According to the Region's response to comments, volatile organic compounds are among the "constituents of concern" at this location. Response to Comments at 9. Therefore, the Region maintains, analyzing the first 6 inches is inadequate because of volatilization. There is a high probability that contamination would not be found in the top 6 inches. Deeper soil sampling is necessary to prove no contamination exists. [*Id.*]

In any event, GMC's contentions do not affect the validity of the SWMU designation, which is the only issue as to this SWMU before us. The petition for review is therefore denied insofar as it pertains to SWMU No. 22.

4. *"East Loading Dock Area"*

The permit identifies a 240-square-foot driveway adjacent to an emulsion pit as a solid waste management unit (SWMU No. 25) for which an RFI is required. This area was previously used for storage of "dumpster beds of paint sludge." RFA Report at 38. Currently, the area is used by tank trucks while they are pumping spent emulsion out of the emulsion pit and replacing it with fresh emulsion. *Id.*

GMC argues that the loading dock "does not qualify as a SWMU [because] no materials are stored here." GMC Comments on the Draft Permit at 7. GMC does not dispute, however, that the loading dock area was previously used for storage of paint sludge. *See* GMC Reply Brief at 14. That acknowledged use of the loading dock for storage of solid waste is a sufficient basis for the Region's SWMU designation. As the Subpart S definition makes clear, no evidence of a release is required in these circumstances.[15] The petition for review is therefore denied insofar as it pertains to SWMU No. 25.

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[14] The documents generated by GMC's consultant during the site assessment appear to confirm the Region's understanding. *See* Response to Petition, Exh. G (Site Assessment Plan) at 8 ("Initially, only the 0-6 inch samples will be submitted for analysis. Results from the samples from the storage area will be compared to background samples of comparable depth."); Response to Petition, Exh. H (Site Assessment Plan Implementation Report) at 9 ("Total metals results from the 0-6 inch samples obtained in the storage area were compared to background samples of comparable depth.").

[15] On appeal, GMC also seeks to argue that the loading dock is not a "discernible unit" (Petition for Review at 13; Reply Brief at 19), presumably to avoid the portion of the Subpart S SWMU definition that encompasses "any discernible unit at which solid wastes have been placed at any time." GMC does not explain why the loading dock does not constitute a discernible unit and this argument was not, in any event, raised in GMC's comments on the draft permit. The argument therefore was not preserved for review in accordance with 40 C.F.R. §§ 124.13 and 124.19.

5. *"#309 Plating Area"*

This is the site of a former electroplating unit as to which the available information is quite limited. The Region seeks to require GMC to produce any information in its files concerning the possibility of soil contamination underneath this unit, because GMC acknowledges having excavated "contaminated soil" when the plating apparatus was dismantled in 1983 and because, according to the RFA Report, the records examined thus far "do not indicate if all the contamination was removed." RFA Report at 16.

In its comments on the draft permit, GMC urged that any corrective action with respect to this unit be deferred until such time as the equipment currently in use at that particular site[16] is decommissioned. GMC Comments on the Draft Permit at 4-5. The Region fully acceded to this request, affirmatively stating that no RFI will be required for the unit "under the existing conditions" of active production. Response to Comments at 5.

> However, a certain amount of information from the facility files on SWMU #3 could be gathered and submitted to the Agency. For example, if soil sampling was conducted before the liner was installed [under the former #309 plater site], these analyses should be submitted. This would have no impact on the production areas. [*Id.*]

With its original comment having been accepted and fully accommodated by the Region, GMC now seeks to argue that the #309 plater site was not properly designated as a SWMU because it is not a "discernible unit." Petition for Review at 9. This issue was not raised in GMC's comments on the draft permit, and was therefore not preserved for review in accordance with 40 C.F.R. §§ 124.13 and 124.19. The petition for review is therefore denied insofar as it pertains to the designation of the location formerly occupied by the #309 plater unit as a SWMU.

B. *Notice of Planned Changes*

Region V initially included in this permit a provision (Permit § I.D.10) that would have required GMC to "give advance notice to the Regional Administrator of any planned physical alterations or additions to the permitted facility." GMC has objected to this provision as being overbroad because it could cover alterations not related to GMC's HSWA obligations. GMC points out that in *GMC Delco Moraine*, the

[16] Evidently, since the removal of the #309 plater, a new electroplating unit (#352) and a caustic stripper system tank have been established in the same area. GMC Comments on the Draft Permit at 4.

Board indicated that when EPA issues only the HSWA portion of a permit (that is, where the State is authorized to issue the non-HSWA portion on its own), EPA must "tailor" a provision such as this "so that it would apply only to those changes in plant operations affecting [the permittee's] HSWA obligations." *GMC Delco Moraine*, RCRA Appeal Nos. 90-24 & 90-25, at 23. Region V has agreed to limit this permit's notice requirement in light of *GMC Delco Moraine*, such that the requirement will apply only to facility activities "necessary to" the facility's HSWA compliance. Permit § I.D.10 is remanded to the Region for the purpose of implementing such a revision.

C. *Dispute Resolution*

GMC has challenged the final permit decision's lack of a dispute resolution mechanism for administratively challenging the Region's disapproval or revision of any of the various submissions that will determine the scope of investigation required at this facility. At the time the Region's final permit decision was issued and GMC filed its appeal, cases raising the same issue were pending before the Board. Since the filing of GMC's petition, the Board has addressed the issue at length in *In re General Electric Company*, RCRA Appeal No. 91-7 (EAB, April 13, 1993). In *General Electric*, we held that where, as here, a permit allows the Region to revise interim submissions prepared by the permittee during the corrective action process, the permit must afford the permittee an opportunity for a hearing on any disputed revision. *Id.* at 16. The permittee is not entitled to a formal, trial-type hearing, but must have an opportunity to have its objections addressed by the Regional permitting staff and by the Regional official with authority to issue a final HSWA permit decision. *Id.* at 30. *See also In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 5-6; *In re Environmental Waste Control, Inc.*, RCRA Appeal No. 92-39, at 14-15.

After initially taking the position that this issue had not been preserved for review, the Region has now agreed to include in GMC's permit a dispute resolution mechanism conforming to this Board's holding in *General Electric*. Accordingly, we remand the permit to the Region for the purpose of adding such a provision.[17]

D. *Split Samples*

GMC has sought a permit provision stating that if a Regional representative takes a sample of any substance or parameter from GMC's facil-

[17] With respect to this particular issue, the Region has also presented, in its Response to Petitioner's Reply Brief (July 9, 1993), the specific language that it proposes to include in the permit on remand. The language proposed by Region V is not, however, part of the final permit decision being challenged in this appeal, and we therefore express no view concerning the Region's proposed dispute resolution language.

ity pursuant to 40 C.F.R. § 270.30(i)(4), then the sample shall be "split" with GMC. The Region has agreed to insert such a provision into the permit on remand, but the Region resists GMC's demand for language specifying that the sample must be split "at the time of collection or prior to [the EPA representative] leaving the facility." The Region is concerned that, in order to accommodate such a requirement, it might be forced to compromise the integrity of a sample by opening a sealed container under circumstances that are not "technically appropriate." The language that the Region proposes to include would state: "In any instance where the Regional Administrator, or an authorized representative, collects samples, the Permittee retains the right to split samples." Response to Petition at 7.

The language proposed by the Region is adequate for its intended purpose and does not reflect a clear error of law. The permit language reaffirms, without embellishment, whatever rights GMC may enjoy in this regard by virtue of the statute. *See* RCRA § 3007(a)(2), 42 U.S.C. § 6927(a)(2).[18] As such, it does not (and indeed it could not) deprive GMC of any of its statutory rights. This issue is therefore remanded to the Region for inclusion of a "split sample" provision as proposed in the Region's response to the petition for review.

E. *Authority to Modify the Permit Under RCRA §3005(c)(3)*

GMC objects to a portion of Permit § I.B stating that the permit may be modified by EPA at any time "to include any terms and conditions determined necessary to protect human health and the environment pursuant to Section 3005(c)(3) of RCRA." The Region has agreed to revise this provision, in light of our decision in *GMC Delco Moraine*, so as to recognize the constraints imposed by the permit modification requirements of 40 C.F.R. § 270.41. *See GMC Delco Moraine*, RCRA Appeal Nos. 90-24 & 90-25, at 20-22. As revised, this provision will declare that the permit may be modified by EPA "*consistent with 40 CFR 270.41*, to include any conditions determined necessary to protect human health and the environment pursuant to Section 3005(c)(3) of RCRA." Region's Response to Petitioner's Reply Brief at 5 (emphasis added). Permit § I.B is remanded to the Region for incorporation of this proposed revision.

[18] Because the Region has not opposed GMC's request for some type of "split sample" provision to be included in this permit, the question whether EPA is legally obligated to include any such provisions in its RCRA permits is not before us. Therefore, we express no view with respect to that question.

F. *Miscellaneous*

In a final set of objections that appear as a group in the petition, GMC argues for the addition of specific words or phrases to Permit §§ I.D.7, I.D.9, III.E, III.F.1, and III.F.3. GMC first requests that four of these provisions be revised so as to expressly incorporate a standard of reasonableness (*e.g.*, "The Regional Administrator shall * * * specify a *reasonable* due date for the submittal of a revised Report"; "[T]he Regional Administrator may determine that there is insufficient information on which to *reasonably* base a determination [of no further action]"). Next, GMC requests the addition of a phrase to Permit § III.E, which describes EPA's authority to require corrective action for newly discovered SWMUs or releases: According to GMC, this provision must include the words "to protect human health and the environment."[19] Finally, GMC contests Permit § I.D.9, which, consistent with 40 C.F.R. § 270.30(j)(2), provides that the three-year data-retention period for corrective action records "may be extended by request of the Regional Administrator at any time." That provision, GMC argues, must be revised to allow an extension of the applicable period only "by *written* request of the Regional Administrator." Petition for Review at 4-6.

In response, the Region has agreed to insert the word "reasonable" in one of the four permit provisions (specifically, Permit § I.D.7 ["Duty to Provide Information"]) for which that change is requested. The Region explains that that particular provision tracks the language of 40 C.F.R. § 270.30(h), which itself refers to a duty to provide requested information "within a reasonable time." But the Region urges us to deny review of GMC's remaining objections of this nature, arguing that, because the permit does not mischaracterize the regulatory authority for any of its conditions, there is no legal error and the provisions in question do not warrant review.

We agree with Region V. The Region acknowledges that it is EPA's practice to "administer the RCRA program in a reasonable manner," Response to Petition for Review at 8, but there is no authority for requiring EPA to include an explicit statement to that effect in each permit provision for which a permittee may desire it. As we have previously observed in a similar context, the Regions are subject to a general requirement to "act reasonably in implementing all permit conditions." *In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 18 (EAB, July 29, 1993); *see also In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 7-8 (Region was obliged to "act reasonably" on any modification request based on an alleged force majeure event and needn't adopt a permit

[19] GMC's requested version of this permit condition would state: "The Regional Administrator will review the information provided in Condition III.D above [concerning a newly discovered SWMU or release,] and may, as necessary, require further investigations or corrective measures *to protect human health and the environment.*"

provision excusing future noncompliance caused by events beyond the permittee's control). The general obligation to act reasonably, as well as the incorporation of a dispute resolution provision on remand, should suffice to protect GMC against arbitrary or irrational demands. We decline to order the inclusion of explicit "reasonableness" language except to the extent that the Region has already agreed to incorporate such a standard into Permit § I.D.7.

We likewise reject GMC's demand for requiring a "written" extension of the applicable record-retention period. While this would appear to be sound practice, GMC has not cited nor have we found any legal basis for a permittee to demand the inclusion of such a requirement.[20]

Finally, the Region need not expressly state in its permit that corrective action for newly discovered SWMUs or releases will be required only "to protect human health and the environment." It is true that the operative regulatory provision, 40 C.F.R. § 264.101, indicates that a permittee "must institute corrective action as necessary to protect human health and the environment ..." However, there is no necessity for an explicit restatement of that provision. So long as the permit does not affirmatively misstate the limits of EPA's regulatory authority under HSWA or seek to impose conditions that lie beyond the bounds of that authority, we see no reason to grant review.

Accordingly, we remand Permit § I.D.7 for addition of the language proposed by Region V, and we deny review with respect to Permit §§ I.D.9, III.E, III.F.1, and III.F.3.

III. *CONCLUSION*

The permit is remanded to Region V for revision of sections I.B (Permit Actions), I.D.7 (Duty to Provide Information), I.D.8 (Inspection and Entry), and I.D.10 (Reporting Planned Changes) in a manner consistent with the discussion herein, and for inclusion of a dispute resolution provision.[21] Appeal of the remand decision will not be required to exhaust administrative remedies under 40 C.F.R. § 124.19. In all other respects, GMC's petition for review is denied.

So ordered.

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[20] To the extent the issue may be one of providing adequate notice of an extended recordkeeping period (which GMC never actually claims), the Region's general obligation to act reasonably in implementing the permit and the evidentiary burdens associated with proving a permit violation provide adequate safeguards for GMC.

[21] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *See, e.g., In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 34 n.38.