IN THE MATTER OF ALLIED-SIGNAL, INC. (FRANKFORD PLANT)

RCRA Appeal No. 90–27

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided July 29, 1993

Syllabus

The permittee, Allied-Signal, Inc., seeks review of several provisions of a permit issued to it by EPA Region III pursuant to the Hazardous and Solid Waste Amendments (HSWA) of the Resource Conservation and Recovery Act (RCRA). First, the permittee alleges that the permit's dispute resolution provision denies it due process because the provision allows the Region to impose additional requirements without allowing Allied-Signal a meaningful opportunity to challenge such requirements before they are imposed. Second, the permittee contends that the permit condition requiring notification of groundwater contamination to owners and residents of overlying property is unwarranted and unduly burdensome. Third, the permittee asserts that the Region abused its discretion by failing to change language in various permit provisions to reflect the Region's responses to the permittee's comments on the draft permit.

Held: (1) The dispute resolution provision of the permit provides ample opportunity for the permittee to contest any additional new requirements that may be imposed upon it during the course of the corrective action process, including any additional new requirements imposed as a result of the Region's review and approval of the permittee's interim submissions. Therefore, review of this objection to the permit is denied. (Requirements that are imposed by the Region during the corrective action process but which merely restate existing permit requirements are enforceable in accordance with their original terms and implementation of those requirements may not be postponed while the dispute resolution process is underway.) (2) The groundwater notification provision in the permit was adapted from the Agency's Subpart S proposal, see 55 Fed. Reg. 30,798 (July 27, 1990), which includes a notice requirement almost identical to the one at issue here. As a proposed regulation, the Subpart S proposal does not have the force and effect of law. Although the Agency is free to draw upon language in the proposal when writing the terms of an individual permit, the proposal is non-binding, and "open to attack in any particular case." *See General Motors Corporation, Delco Moraine Division, et al.,* RCRA Appeal Nos. 90–24, 90–25, at 11, n. 15 (EAB, Nov. 6, 1992); *In re Envirosafe Services of Idaho, Inc.,* RCRA Appeal No. 88–41, at 6 (Adm'r, Apr. 3, 1990) (citing *Panhandle Producers and Royalty Owners Ass'n v. Economic Regulator Admin.,* 822 F.2d 1105, 1110–1111 (D.C. Cir. 1987)); *see also Simmons v. ICC,* 757 F.2d 296, 300 (D.C. Cir. 1985) ("When an Agency promulgates a policy without the formalities required to make it a valid rule, it must * * * in subsequent adjudications, 'be prepared to support the policy

just as if the policy statement had never been issued.'" (citation omitted)). In this case, the Environmental Appeals Board is not persuaded that the Region has performed a sufficiently thorough permit-specific analysis as to why this particular notice requirement is appropriate. *See In re Sandoz Pharmaceuticals Corporation,* RCRA Appeal No. 91–14, at 11 (EAB, July 9, 1992) ("Sandoz is correct that corrective action requirements should be tailored to site-specific conditions at the facility."), citing *In re American Cyanamid Company,* RCRA Appeal No. 89–8, at 7 (Adm'r, Aug. 5, 1991) ("EPA guidance documents emphasize the importance of tailoring RCRA corrective action requirements to site-specific conditions in order to avoid imposing unnecessary or inappropriate burdens upon the permittee."). Therefore, the Board is remanding the permit to the Region for further consideration, as specified in the decision. (3) For the reasons stated in the decision, the concerns expressed by the permittee over proposed permit conditions and other matters which the permittee believes the Region agreed to, but did not, change in the final permit are either unfounded or, based on clarifications of interpretation by the Region, no longer merit further consideration. Therefore, review of these concerns is not warranted.

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

Opinion of the Board by Judge McCallum:

Allied-Signal, Inc. has petitioned for review of a permit issued by U.S. EPA Region III on September 28, 1990, pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA") as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C §6901 *et seq.* Among other things, the permit establishes corrective action requirements for Allied-Signal's Frankford Plant, a phenol and acetone production facility located in Philadelphia, Pennsylvania.[1]

Under the rules that govern 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. 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 * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner. *See In re Beazer East, Inc. and Koppers Industries, Inc.,* RCRA Appeal No. 91–25, at 3 (EAB, Mar. 18, 1993).

[1] The entire RCRA permit issued to Allied-Signal consists of the portion issued by Region III, which addresses the HSWA requirements, and the portion issued by the Commonwealth of Pennsylvania, which addresses that portion of RCRA for which Pennsylvania is authorized pursuant to RCRA § 3006(b).

Allied Signal maintains that review of this permit is warranted on three grounds. First, Allied-Signal alleges that the permit's dispute resolution provision allows the Region to impose additional requirements without allowing Allied-Signal a meaningful opportunity to challenge such requirements before they are imposed, and therefore denies Allied-Signal due process. Second, Allied-Signal contends that the permit condition requiring notification of groundwater contamination to owners and residents of overlying property is unwarranted and unduly burdensome. Third, Allied-Signal asserts that the Region abused its discretion by failing to change language in various permit provisions to reflect the Region's responses to Allied-Signal's comments on the draft permit. For the reasons stated below, we conclude that the second ground for review raises legitimate concerns about the notification provision of the permit such that the permit should be remanded to the Region for further action. With respect to the remaining two grounds for review, we are not persuaded that they have any merit and, therefore, review is denied under § 124.19.

A. *Dispute Resolution Provision*

Over the course of the corrective action process, Allied-Signal's permit requires it to submit various interim submissions to the Region for approval. For example, the permit requires Allied-Signal to submit a RCRA Facility Investigation ("RFI") [2] workplan detailing the investigations, tests, and other such matters that Allied-Signal proposes to use to determine the extent and nature of any releases from solid waste management units ("SWMUs") and the need for corrective measures. *See* Permit Condition II.B. The permit further requires that upon approval of the RFI workplan, Allied-Signal shall fulfill the requirements of the plan and thereafter submit a report of the completed RFI work to the Region for approval. *Id.* The objective of the RFI report "shall be to ensure that the investigation data are sufficient in quality * * * and quantity to describe the nature and extent of contamination, potential threat to human health and the environment, and to support the Corrective Measures Study." Permit Attachment C, at C–16. The relationship among the various plans and reports are summarized by the Region in the following manner:

[2] In general terms, the RFI is the portion of the corrective action process where the permittee assesses releases previously identified by the Agency in the RCRA Facility Assessment by characterizing the nature and extent of the release. *See In re General Motors Corp.*, RCRA Appeal Nos. 90–24, 90–25, at 7, n.9 (EAB, Nov. 6, 1992); *In re American Cyanamid Co.*, RCRA Appeal No. 89–8, at 2, n.3 (Adm'r, Aug. 5, 1991).

> The information required to be submitted to EPA in the form of reports (*e.g.,* the RFI and CMS Reports) is based on "tasks" which are initially described in the workplans for the studies on which such reports are based (*e.g.,* RFI Plan, CMS Plan). These workplans are prepared by the permittee and approved by EPA. These workplans describe, *inter alia,* location of wells, sampling parameters, soil conditions, surface water and sediment conditions, *etc.* Once the workplans and accompanying schedules are approved, the Permittee performs the specified tasks and generates the Report (*e.g.,* RFI Report, CMS Report).

Response to Petition for Review at 3–4.

Upon the Region's approval of a permittee's plans and reports, they become incorporated into the permit pursuant of permit condition I.C:

> All plans, reports, schedules, and other submissions required by the terms of this permit are, upon approval by the Regional Administrator, incorporated into this Permit. Any noncompliance with such approved studies, schedules, plans, reports, or other submissions shall be deemed noncompliance with this Permit.

Thus, once incorporated into the permit, the various interim submissions, like other permit provisions, become fully enforceable parts of the permit.

Allied-Signal's appeal focuses on the permit's dispute resolution provision, which establishes a procedure for resolving disputes over whether a particular interim submission, such as the RFI workplan or RFI report, should be approved by the Region and thus become an enforceable permit condition. Before turning to Allied-Signal's specific grievance with this provision, it will be useful to highlight some of its salient features. The complete text of the provision appears in the margin below.[3]

[3] The dispute resolution provision provides as follows:

> In the event of EPA disapproval in whole or in part of any submission requiring EPA approval, the Regional Administrator shall specify any deficiencies in writing. The Permittee shall modify the document to correct the deficiencies within thirty (30) days from receipt of disapproval by the Regional Administrator. The

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As written, the dispute resolution provision contemplates two possible scenarios following the Region's disapproval of a permittee's interim submission. The first is uncontroversial and arises whenever the permittee either agrees with the Region's deficiency determination or decides not to contest it. In either case, the permittee must submit a revised document to correct the deficiencies specified by the Region within 30 days of the deficiency determination. Upon timely submission of the revised document, the document becomes incorporated into the permit as provided by permit condition I.C. and is immediately enforceable. The formal permit modification provisions in 40 C.F.R. §§ 270.41 and 270.42 do not come into play under this scenario.

The second scenario is directly pertinent to the instant appeal. It takes place whenever the permittee decides to contest the deficiency determination. In that event, there begins a 45-day informal dispute resolution process in which the permittee must submit, within 15 days of the deficiency determination, a statement of grounds for taking exception to the determination. Following that, there is a 30-day period during which the permittee and the Region are expected to confer with each other to resolve their differences. If those efforts are not successful by the end of the 30-day period, then the permittee must revise the document in accordance with the Region's directions. Although at this point the revised document is implicitly approved by the Region, and therefore would be subject to immediate incorporation into the permit if permit condition I.C. were the sole controlling consideration, the last sentence of the dispute resolution provision indicates otherwise. It provides, in effect, that the revised document will not become incorporated into the permit except in accordance with the formal permit modification procedures specified

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> modified document shall be submitted to EPA in writing for review. Should the Permittee take exception to all or part of EPA's disapproval, the Permittee shall submit to the Regional Administrator a written statement of grounds for the exception within fifteen (15) days from receipt of EPA's disapproval. Representatives of EPA and the Permittee may confer in person or by telephone in an attempt to resolve any disagreement. In the event that resolution is not reached within forty-five (45) days from receipt of disapproval by the Regional Administrator, the Permittee shall revise the document as required by EPA. The Permittee, upon submission of the revised document, shall state whether or not he/she agrees in whole or in part with the revised document. In the event of any disagreement, the permit shall be modified in accordance with 40 C.F.R. § 270.41 or 270.42 to incorporate the Regional Administrator's position on the matter in dispute.
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> Permit Condition I.D.

in §§ 270.41 and 270.42.[4] In other words, until those permit modification procedures have run their course, the revised document is not part of the permit and therefore is not immediately enforceable.

This latter aspect of the Allied-Signal dispute resolution provision represents a marked departure from widely followed permitting practices at EPA, which generally do not afford the permittee any recourse to the modification procedures set forth in §§ 270.41 and 270.42 whenever Regional permitting officials revise, or require revision of, interim submissions. *See, e.g., In re General Electric Co.,* RCRA Appeal No. 91–7 (EAB, Apr. 13, 1993). Indeed, by reason of previous decisions of this Board and the Administrator, *In re General Electric Co., supra,* and *In re W.R. Grace & Company,* RCRA Appeal No. 89–28 (Adm'r, March 25, 1991), it is clearly established that the revision of an interim submission does not constitute a permit modification for purposes of §§ 270.41 and 270.42. Rather, incorporation of such a submission into the permit is in the nature of action taken to implement preexisting permit obligations, and for that reason does not represent a permit modification. *Id.*

> The fact that a Region revises the interim submission does not change this analysis. When the Region revises an interim submission, it is exercising its authority under the existing permit language to insure that the contemplated studies and investigations are adequate for selection of corrective remedies. The Region's revisions are part of a process contemplated in the original permit by which the general terms of the original permit are made more specific. Thus, when the Region makes such revisions, it is fulfilling the terms of the permit, not changing them. * * * [W]e conclude that Regional revisions to interim submissions are not appropriately characterized as modifications of the permit subject to the formal modification procedures of Section 270.41 and Part 124.

In re General Electric Co., supra at 11–12 (footnotes omitted).

[4] The procedures specified in §§ 270.41 and 270.42 are general rules for effecting changes to permits (*e.g.*, permit modifications) whether initiated by the permit issuer or by the permittee. Under these procedures, significant permit modifications are effected through a process that resembles issuance of a permit, with requirements for issuing a draft modification, an opportunity for public comment on the draft modification, and issuance of the final permit modification, which, in turn, is appealable to the Environmental Appeals Board for a final decision before it becomes effective. *See generally* 40 C.F.R. § 270.41 and Part 124.

Nevertheless, in making revisions to interim submissions, the Regions must satisfy certain minimum due process requirements: *i.e.,* they must (i) afford the permittee the opportunity to submit written statements to, and meet with, members of the permitting staff responsible for making the disputed revisions, (ii) afford the permittee an opportunity to present its objections in writing to the person in the Region who has authority for making the final permit decision, and (iii) issue a written decision based on the record that responds to the evidence and arguments of the permittee. *Id.* at 17 and 30. The permit modification procedures in §§270.41 and 270.42 by comparison are potentially much more elaborate, providing *inter alia* for a public hearing in certain cases and an opportunity to appeal the resulting decision to this tribunal. Therefore, when comparing the dispute resolution provision in Allied-Signal's permit to the foregoing minimum due process requirements, it is clear that Allied-Signal's permit affords significantly more procedural process to the permittee than is required by law, as well as existing Agency practices and procedures.

Notwithstanding the additional process afforded by the dispute resolution provision, Allied-Signal still finds fault with the dispute resolution provision because, as best we are able to interpret its objections, it fears that regardless of the process afforded it in revising an interim submission, it may nevertheless be compelled, over its objections, to do testing or perform other burdensome and expensive requirements without any process whatsoever. In the words of Allied-Signal:

> EPA appears to have misunderstood Allied's concern with [the dispute resolution provision]. It is not the availability of comment and appeal in general that is the issue, but rather the question of whether the permit modification occurs before or after the time when the Permittee must conduct potentially significant additional studies. The revision of the document prior to permit modification is not *per se* objectionable, but when such revision must be preceded by, *e.g.,* additional testing or other expenditures, the burden placed on the Permittee is impermissibly onerous. * * * [W]here revision of the submission would involve more than simply revising a document, the Permittee should not be required to make the

> changes required by EPA prior to permit modification. Rather, EPA should require the changes through the permit modification process itself.

Petition for Review at 3–4.

As explained by the Region, however, there should be no occasion where, barring Allied-Signal's noncompliance with an existing permit requirement, Allied-Signal will not have an opportunity to challenge the revision of an interim submission before having to perform additional testing or incurring other expenditures required by the revision. The Region notes that there are two possible circumstances that might prompt it to direct Allied-Signal to perform testing following Allied-Signal's submission of an RFI report. *See* Response to Petition for Review at 4. One is a noncompliance situation where the Region's review of the RFI report reveals that Allied-Signal is in violation of a testing requirement already incorporated in the permit, such as in a previously approved RFI workplan. No new testing is involved in this situation, since the testing requirement already exists elsewhere in the permit.[5] The other situation is when the Region's review of the RFI report reveals that testing requirements not required by an existing permit provision are nevertheless necessary to achieve the goals of the corrective action process. *Id.* This situation involves new testing. It is only in the first circumstance where Allied-Signal would not be entitled to postpone implementation of the testing requirement until the dispute resolution procedures for revising the interim submission have run their course; however, as explained below, there is no deprivation of due process in that instance.

In the first situation, a revision of the report directing Allied-Signal to perform testing already required by the permit, but not yet complied with, would amount to no more than a restatement of an existing obligation. There is no reason why the mere restatement of that obligation in a revision of an interim submission should postpone implementation of the existing testing requirement. The regulations impose a continuing obligation on permittees to comply with all existing provisions of their permits, 40 C.F.R. § 270.30(a).

[5] Strictly speaking, there is no need in this situation for the Region to revise the permit in order to compel the permittee to comply with such a testing requirement. Since the testing requirement already exists elsewhere in the permit (for example, the RFI workplan), revising a report to add the testing requirement amounts to a redundancy. Nevertheless, for purposes of this decision we will assume that the Region has valid and compelling reasons (relating to administration of the permit) for duplicating an existing requirement.

Any noncompliance with the permit, including noncompliance with requirements relating to the submission of documents and reports, can give rise to the immediate exercise of the Agency's enforcement authority. *See* RCRA § 3008(a) (authorizing the Agency to enforce against violations of the Act, such as a failure to comply with mandatory permit requirements). This authority can be invoked at any time when a violation is believed to exist, and is therefore independent of the Region's authority to revise a permittee's interim submissions. Consequently, the fact that the Region might restate an existing requirement in the context of revising a permittee's interim submission does not, without more, provide a basis for the permittee to postpone compliance with that requirement until the dispute resolution procedures for revising the interim submission have run their course. If Allied-Signal chooses not to comply with the requirement, the Region will presumably bring an enforcement action against it and all appropriate due process will be afforded to Allied-Signal in that context.

In the second situation, any requirement to perform testing that might arise from the Region's review and revision of an interim submission would flow from the Region's determination that compliance with the existing permit requirements, such as requirements contained in an approved RFI workplan, has failed to generate the type of information necessary to proceed to the next phase of the corrective action process. In that situation, any requirement or directive to perform testing would create a new obligation. The Region would have to implement the permit modification procedures before making the new testing requirement effective and enforceable. This is in fact exactly what the dispute resolution provision provides for, and this is also exactly how the Region interprets the provision. As explained by the Region,

> [I]f EPA determines that *additional* tasks not required by the approved workplan are necessary to achieve the goals of the study in issue, EPA may only require such tasks of Permittee by the permit modification process. Such process would, of course, provide Petitioner with the opportunity to be heard as to the appropriateness of the additional tasks. It is this opportunity which Petitioner appears to be seeking in its Petition, and which it already has.

Response to Petition for Review at 4.[6] It is clear, therefore, that in this second situation Allied-Signal's petition is grounded on an erroneous assumption, *i.e.,* that the permit modification procedures are not available before the testing requirement becomes mandatory. They are in fact available, and therefore Allied-Signal's petition for review does not raise any legitimate grounds for reviewing the dispute resolution provision of the permit. The available procedures in the circumstances described afford Allied-Signal the amount of process it has requested.

B. *Groundwater Contamination Notification*

A portion of the RFI Workplan/Investigation/Report Requirements in Allied-Signal's permit is entitled "Community Relations." One of the requirements of this Community Relations section provides for giving notification to neighboring property owners and residents if contaminants have migrated beyond the facility boundary:

> If, upon completion of the RFI, the Permittee discovers that hazardous constituents in the groundwater that may have been released from a SWMU at the Facility have migrated beyond the Facility boundary in concentrations that exceed health-based levels, the Permittee may be required within fifteen (15) calendar days of such discovery, [to] provide written notice to the Regional Administrator and any person who owns or resides on the land which overlies the contaminated groundwater.

Permit Attachment C, Section A.6.b (footnote omitted).

Allied-Signal contends that this provision is unreasonable because the Frankford Plant is located in a high density commercial and residential area where the groundwater is neither used nor usable for drinking water and therefore there is no likely route of human exposure to the contamination.[7] It argues further that the plant's

[6] We hereby deem the Region's interpretation of the permit condition containing the dispute resolution provision as binding, thus eliminating Allied-Signal's concern. *See In re Owen Electric Steel Company of South Carolina,* RCRA Appeal No. 89–37, at *3,* n.1 (Adm'r, Feb. 28, 1992) (The Administrator "deemed" the Agency's reading of the permit to be authoritative and binding, since it flowed directly from the language of the permit and was reasonable).

[7] Allied-Signal also argues that because the groundwater is not a source of drinking water, the use of health-based action levels that are linked to drinking water to trigger the notice requirement is inappropriate, and in any event the permit definition

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location makes the notice requirement onerous since it would require Allied-Signal to (1) gain access to and conduct groundwater sampling at numerous off-site locations to determine if contamination came from one of its SWMUs, and (2) determine the identities and addresses of every owner and resident of overlying property, both of which "could be extremely time-consuming and difficult, if not impossible, tasks." Petition for Review at 8. We construe Allied-Signal's arguments as a challenge to the necessity of the notice requirement, and hence to the adequacy of the Region's justification for including the provision in the permit.[8]

The Region responds that the notification requirement is reasonable, despite the fact that the groundwater is not currently used for drinking water and notwithstanding any unavoidable, but necessary, burdens it may impose upon Allied-Signal. It argues that notice serves the dual purposes of (i) informing present and future users of the potential health risks of the contaminated groundwater and (ii) providing those users with an opportunity to comment upon potential response actions. Response to Petition for Review at 6. The Region also points out that some individuals may be using the groundwater for purposes other than drinking, and their interests must also be factored into the decision to include the notice requirement. *Id.* at 7. To give validation to these purposes, the Region cites the Agency's Subpart S proposal, *see* 55 Fed. Reg. 30,798 (July 27, 1990), which includes a notice requirement almost identical to the one at issue here.[9] As stated in the preamble to this still-pending proposal, the notice requirement is intended "to provide adequate

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of health-based levels is too vague. We agree with the Region that this issue was not raised in Allied-Signal's comments on the draft permit, even though it was reasonably ascertainable at that time, and therefore is not preserved for review. *See 40* C.F.R. §§ 124.13 and 124.19(a); *In re Pollution Control Industries of Indiana, Inc.*, RCRA Appeal No. 92–3, at 3–4 (EAB, Aug. 5, 1992).

[8] Although the potential recipients of notice under the permit provision include the Regional Administrator as well as neighbors of the permittee's facility, Allied-Signal does not specifically voice objection to giving notice to the Regional Administrator. Accordingly, we interpret Allied-Signal's objections as being confined to giving notice to the neighboring residents and property owners.

[9] Proposed 40 C.F.R. § 265.560 provides:

> If at any time the permitted [sic] discovers that hazardous constituents in ground water that may have been released from a solid waste management unit at the facility have migrated beyond the facility boundary in concentrations that exceed action levels, * * * the permittee shall, within fifteen days of discovery, provide written notice to the Regional Administrator and any person who owns or resides on the land which overlies the contaminated ground water.

55 Fed. Reg. at 30,882.

awareness for persons who are, or who could potentially be exposed to the contaminated ground water." Response to Petition for Review at 6 (quoting 55 Fed. Reg. 30,798, 30,845 (July 27, 1990)). Except for this reference to the Subpart S proposal, no specific legal authority is cited by the Region for including the notice provision in the permit. Because we are not fully persuaded by the Region's stated rationale for including this condition in the permit, we are remanding this aspect of the permit to the Region for further action, as explained below.

We do not question the Agency's authority to issue a rule containing a notice requirement along the lines of the permit's notice requirement. The Agency has general rulemaking authority under RCRA to "prescribe * * * such regulations as are necessary to carry out [its] functions under [the Act]." RCRA § 2002(a)(1), 42 U.S.C.A. § 6912(a)(1). Those functions include, *inter alia*, "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment,"[10] and establishing measures to carry out the corrective action provisions of RCRA contained in RCRA § 3004(u) ("Continuing releases at permitted facilities") and RCRA § 3004(v) ("Corrective action beyond facility boundary"). Under the latter of these two sections, RCRA § 3004(v), the Agency may require corrective action "beyond the facility boundary where necessary to protect human health and the environment unless the [permittee] demonstrates to the satisfaction of the Administrator that, despite the [permittee's] best efforts, the [permittee] was unable to obtain the necessary permission to undertake such action." 42 U.S.C. § 6924(v).[11] By making the duty to perform remedial action conditional upon obtaining permission from neighboring residents and property owners, RCRA § 3004(v) implicitly, but unequivocally, contemplates that some form of notice to those individuals may be necessary during some phase of the corrective action process *prior to* obtaining their permission to enter upon the property and commencing remedial action. Therefore, as a general proposition, properly promulgated regulations containing notice requirements are easily justifiable under the Act.

The proposed Subpart S rule is intended to address the corrective action provisions of the Act. 55 Fed. Reg. 30,799 ("This rule defines both the procedural and substantive requirements associated with

[10] RCRA § 1003(a)(4), 42 U.S.C.A. § 6902(a)(4).

[11] Corrective action beyond the facility boundary can be implemented through a RCRA permit. *See* 40 C.F.R. § 264.101(c) and § 270.32(b)(1); *In re General Electric Company,* RCRA Appeal No. 91–7, at 12–16 (Remand Order, EAB, Nov. 6, 1992).

sections 3004(u) and 3004(v)."). What the Region fails to recognize, however, is that the regulations in the proposed Subpart S rule are merely *proposals*, not final regulations, and therefore they do not have the force of law. They cannot be used to foreclose discussion of whether it is proper to include them, or provisions similar to them, in an individual permit. At most, they represent policy guidance by the Agency, to be followed if appropriate in the circumstances of the individual permit.[12] This is not to say that the Agency is barred from drawing upon language in proposed regulations such as the Subpart S regulations when writing the terms of an individual permit. Clearly, it may do that; however, since the proposed regulations are non-binding, they are "open to attack in any particular case." *See In re General Motors Corporation, Delco Moraine Division, et al.*, RCRA Appeal Nos. 90–24, 90–25, at 11, n. 15 (EAB, Nov. 6, 1992) (citing with approval the "Friedman Memorandum");[13] *In re Envirosafe Services of Idaho, Inc.*, RCRA Appeal No. 88–41, at 6 (Adm'r, Apr. 3, 1990) (citing *Panhandle Producers and Royalty Owners Ass'n* v. *Economic Regulator Admin.*, 822 F.2d 1105, 1110–1111 (D.C. Cir. 1987)); *see also Simmons* v. *ICC*, 757 F.2d 296, 300 (D.C. Cir. 1985) ("When an Agency promulgates a policy without the formalities required to make it a valid rule, it must * * * in subsequent adjudications, 'be prepared to support the policy just as if the policy statement had never been issued.'" (citation omitted)). Consequently, whenever the Agency adopts a requirement from the Subpart S proposals, it must be prepared to "consider[ ] and reject[ ] proffered counterarguments."[14] *In re Envirosafe Services of Idaho, Inc., supra* at 6.

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[12] As noted in previous decisions of this Board, the proposed Subpart S regulations represent the Agency's most recent, comprehensive statement on corrective action. *See, e.g., In re Beazer East, Inc. et al.*, RCRA Appeal No. 91–25, at 5, n.6 (EAB, March 18, 1993); *In re General Electric Company*, RCRA Appeal No. 91–7, at 17, n.9 (EAB, November 6, 1992).

[13] The Friedman Memorandum is a legal guidance document issued to EPA Regional Counsels and RCRA Branch Chiefs, which indicates that although most of the Subpart S proposal may be used as guidance, any specific permit requirements based on the proposal must be justified on a case-by-case basis. *See* Memorandum, dated March 27, 1991, from Lisa K. Friedman, EPA Associate General Counsel, Solid Waste and Emergency Response Division, to Regional Counsels, RCRA Branch Chiefs, regarding "Use of Proposed Subpart S Corrective Action Rule as Guidance Pending Promulgation of Final Rule," at 3.

[14] In *In re Sandoz Pharmaceuticals Corporation*, RCRA Appeal No. 91–14, at 8–11 (EAB, July 9, 1992), the Region included a permit provision similar to one contained in the Subpart S rule, but deviated from it in material respects. We ruled that the deviation required explanation in view of the fact that the Subpart S rule "constitutes the Agency's most recent, comprehensive statement of its views regarding corrective action under RCRA §3004(u)." *Id.* at 9. In so ruling, we did not intend to imply that strict adherence to the Subpart S rule is sufficient justification by

In this case, we are not persuaded that the Region has performed a thorough enough, permit-specific analysis as to why this particular notice requirement is appropriate. *See In re Sandoz Pharmaceuticals Corporation,* RCRA Appeal No. 91–14, at 11 (EAB, July 9, 1992) ("Sandoz is correct that corrective action requirements should be tailored to site-specific conditions at the facility."), citing *In re American Cyanamid Company,* RCRA Appeal No. 89–8, at 7 (Adm'r, Aug. 5, 1991) ("EPA guidance documents emphasize the importance of tailoring RCRA corrective action requirements to site-specific conditions in order to avoid imposing unnecessary or inappropriate burdens upon the permittee."). The notice provision crafted by the Region is unclear as to precisely what circumstances will trigger the notice requirement—notice "may be" required if contaminants in an off-site release exceed specified health-based levels. If the statutory authority for including a notice provision of this type derives principally from RCRA § 3004(v), which seems logical under the circumstances, or from RCRA § 3005(c)(3)—the so-called omnibus provision [15]—then an analysis of either section would lead one to the conclusion that the duty to give notice should be based on whether notice is necessary to protect human health and the environment. However, it is by no means clear that such a determination is required by the notice provision in Allied-Signal's permit. The Subpart S proposal relied upon by the Region indicates that risk- or health-based levels are not conclusive on the issue of protecting human health and the environment. *See* proposed 40 C.F.R. § 264.520, 55 Fed. Reg. at 30,875. For example, under the Subpart S proposal, the Region has the flexibility to determine either that (i) a release in excess of a risk-based level does not require corrective action to protect human health and the environment or (ii) that a release below the threshold nevertheless requires corrective action to protect human health and the environment. *Id.* In view of the Region's reliance on the Subpart S proposal, it is reasonable to assume that it would interpret the section in a similar manner, thus raising the concern that notice

itself to validate inclusion of such a requirement in a permit. To do that would impermissibly raise the status of the proposed Subpart S rule to that of a legally binding final rule.

[15] The analysis is no different if instead of RCRA § 3004(v), the statutory authority for the including of the notice provision in the permit is deemed to be the so-called omnibus clause in RCRA § 3005(c)(3), 42 U.S.C. § 6925 ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."). *See also* 40 C.F.R. § 270.32(b)(2) (same). The omnibus clause and RCRA § 3004(v) both require, as a condition precedent to implementation, a determination of necessity based on protection of "human health and the environment."

might be required without any clear nexus to protection of human health and the environment.

Since we cannot conclude that the notice requirement challenged by Allied-Signal is properly linked to protection of human health and the environment, we are remanding the permit to the Region. On remand, the Region may either eliminate the permit condition [16] or revise it so that notice-giving is only a requirement if a determination has been made that, based on the record, notice is necessary to protect human health and the environment.

C. *Failure to Change Permit Language*

Allied-Signal contends that the Region abused its discretion by failing to change language in the permit to reflect the Region's responses to Allied-Signal's comments on the draft permit. Specifically, Allied-Signal states that "[f]or nine of the permit conditions for which Allied submitted Comments on the draft permit, EPA's Response to Comments accompanying the final permit expressed agreement with Allied's Comments; in each of these cases, however, the Agency refused to change the permit language to accommodate Allied's concerns." Petition for Review at 8. Although Allied-Signal asserts that the Region failed to change the language of nine permit conditions, it is pursuing its request for revised permit language for only three of them. Petition for Review at 9.

Permit condition I.C., as noted earlier, provides that upon approval by the Region, all plans, reports, schedules and other submissions required by the permit are incorporated into the permit. This condition further provides that "[i]n the event of unforeseen circumstances beyond the control of the Permittee which can not be overcome by due diligence, the Permittee may request a change, subject to Regional Administrator approval, in the previously approved plans, reports, schedules or other submissions."

[16] Removal of the permit condition would not relieve Allied-Signal from the duty to give notice under appropriate circumstances in accordance with other permit terms. For example, Permit Condition II.H. requires Allied-Signal to use "its best efforts to obtain access to property beyond the boundaries of the Facility at which corrective action is required by this permit." Notification in some form is implicit in this requirement. Also, if the Region determines that such a release requires corrective action, Permit Attachment E, Section 5.d(e)(iv), requires Allied-Signal to complete a corrective measures study for the release, reporting on, *inter alia*, whether "access, easements [and a] right-of-way" are available to implement the selected corrective measure. Again, notification in some form is implicit in this requirement.

Allied-Signal contends that the "unforeseen circumstances" language "amounts to a force majeure provision, is too restrictive, and should be revised to allow for changes under other circumstances." Petition for Review at 10. In its comments on the draft permit, Allied-Signal requested that this provision be revised to allow any changes to approved plans and schedules to be made through a Class I permit modification under 40 C.F.R. §270.42(a). In response to the comment, the Region stated that:

> EPA does not agree with the Permittee's assertion that this permit condition is restrictive. EPA accepts all reasonable requests to revise plans and submissions. In addition, the Permittee always has the opportunity to submit a Class I permit modification. Accordingly, this provision will remain as written in the draft permit.

Allied-Signal contends if permit condition I.C is not changed to reflect the Region's intention to accept all reasonable requests to revise plans and submissions, Allied Signal must choose whether to follow the language of I.C or the more flexible language in the response to comments if it seeks a modification of an approved submission. In other words, Allied-Signal is concerned that the language of the permit will prevent the Region from fulfilling its promise to accept all reasonable requests to revise plans and submissions.

We conclude that Allied-Signal's concern is unfounded for two reasons. First, the Region's statement in its response to comments that it will accept all reasonable requests to revise plans and submissions merely restates what the Region is already required to do, namely, act reasonably in implementing all permit conditions. In any event, we hereby deem the Region's response to be an authoritative and binding interpretation of the permit condition at issue, thus eliminating Allied-Signal's concern. *See In re General Motors Corporation, Delco Moraine Division, et al., supra, at* 11, n. 15 (2nd ¶) (EAB, Nov. 6, 1992); *In re Owen Electric Steel Company of South Carolina,* RCRA Appeal No. 89–37, at 3, n.1 (Adm'r, Feb. 28, 1992);.[17]

[17] Concerns as to the implementation of permit terms are not normally within the Board's purview. *See In re General Electric Co.,* RCRA Appeal No. 91–7, at 14 (EAB, Nov. 6, 1992) ("[T]he role of the Board is to determine whether the permit was appropriately issued. The Board has no oversight responsibility for the implementation of a validly issued permit."). To the extent that Allied-Signal's concern relates to the implementation of permit condition I.C, it is beyond the purview of the Board in this appeal.

Second, we agree with the Region that even if Allied-Signal doubts the Region's intent to accept all reasonable requests to revise plans and submissions in circumstances meeting the criteria of permit condition I.C, Allied-Signal may seek such revisions through formal permit modification procedures. Under permit condition I.C, approved plans and submissions become an enforceable part of the permit. The permit itself provides, in condition I.F, that its terms may be modified in accordance with 40 C.F.R. §§270.41 and 270.42. Thus, permit condition I.C is not the exclusive means available for Allied-Signal to seek revisions to plans and submissions incorporated into the permit by the Region's approval.[18] Therefore, review of this condition is denied.

Allied-Signal also seeks review of permit condition II.B.2, which states that the RFI Plan "shall comply" with Attachment C, the RFI Plan/Investigation/Report Requirements, and permit condition II.C.2, which provides that the Corrective Measures Study "shall comply" with the requirements of Attachment E, the Corrective Measures Study. Allied-Signal argues that in order to allow the flexibility necessary for the corrective action process, these permit conditions should be changed to allow Attachments C and E to be used as guidelines, and not "followed to the letter." Petition for Review at 12. Although the response to comments indicates that the Attachments are intended to be used as guidance only, Allied-Signal contends that unless the "shall comply" language in the permit is changed to reflect the Region's stated intent, Allied-Signal could be subject to citizen suits under RCRA §7002, 42 U.S.C. §6972. *Id.* at 13.

The Region admits that the response to comments has created some confusion. In response to the petition for review, the Region clarifies its intent, stating that the Attachments are not themselves workplans, but are instead checklists of the elements that must be addressed in a site-specific workplan. Response to Petition for Review at 11. The Region explains that because Attachments C and E "are meant for universal application in designing a workplan, they are

[18] The Region correctly notes that it has no obligation to provide an opportunity for permit modification beyond those provided by 40 C.F.R. §§270.41 and 270.42 of the regulations, as set forth in permit condition I.F. Nevertheless, the Region has provided, in effect, an additional opportunity in the "unforeseen circumstances" provision of permit condition I.C. Thus, under the permit as written, Allied-Signal can proceed under permit condition I.C, which allows modifications in "unforeseen circumstances beyond the control of the Permittee which cannot be overcome by due diligence," or it can proceed under permit condition I.F, which allows permit modifications in a much broader variety of circumstances than under permit condition I.C.

intentionally generic and broad." *Id.* According to the Region, Attachments C and E, however, also allow Allied-Signal the flexibility to tailor the required workplan to the Frankford Plant by addressing each element with information specific to that facility. *Id.*

In light of the Region's explanation of what use must be made of the Attachments to establish compliance with the permit, we conclude that Allied-Signal's concerns do not merit formal review. As explained by the Region, the permit reasonably requires Allied-Signal to comply with its terms by addressing each element of the Attachments with site-specific information. This process allows the party with the greatest familiarity with the facility, Allied-Signal, to apply the generic elements of the Attachments to the facility to create a facility-specific workplan. We conclude that the approach set forth in the permit as interpreted by the Region is sufficiently flexible to allow full implementation of the corrective action process specific to the needs of the Frankford Plant.[19] Based on the Region's interpretation of these permit conditions in its response to the petition for review, which we adopt as binding on the Agency, *see In re Owen Electric Steel Company of South Carolina, supra,* we conclude that review of these permit conditions is not warranted.

CONCLUSION

The notification issue discussed in part B, above, is remanded for further proceedings consistent with this decision.[20] The permit condition containing the notification requirement shall remain stayed on remand. The Region shall give public notice of the remand under 40 C.F.R § 124.10. Appeal of the remand decision shall not be required to exhaust administrative remedies under § 124.19(f)(1)(iii) of the rules. Review of the other two issues raised by Allied-Signal is hereby denied for the reasons set forth above.

So ordered.

[19] *See In re Beazer East, Inc. and Koppers Industries, Inc.,* RCRA Appeal No. 91–25, at 7 (EAB, Mar. 18, 1993) (Region's assurance that RFI and CMS workplan outlines were intended as guidelines was provided in the permit language and was sufficient to allow consideration of site-specific circumstances).

[20] 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. *In re Beazer East, Inc. and Koppers Industries, Inc.,* RCRA Appeal No. 91–25, at 15 (EAB, March 18, 1993).