

IN RE ROHM AND HAAS COMPANY

RCRA Appeal No. 98-2

***ORDER DENYING REVIEW IN PART
AND REMANDING IN PART***

Decided October 5, 2000

Syllabus

Petitioner Rohm & Haas Company (“R & H” or “the company”) has filed a petition for review challenging a final permit decision (“Final Permit”) issued by U.S. EPA Region IV requiring the company to implement various corrective action requirements at its Knoxville, Tennessee facility pursuant to the Resource Conservation and Recovery Act (“RCRA”) sections 3004(u) and 3005(2)(C)(3), 42 U.S.C. §§ 6924(u), 6925(2)(C)(3). Negotiations between R & H and Region IV resolved all but two of the issues the company raised in its petition for review. R & H seeks Board review of the following unresolved issues: (1) whether the Region has the authority to require the company to investigate newly discovered Solid Waste Management Units (“SWMUs”), and newly discovered releases at existing SWMUs and Areas of Concern, without instituting formal permit modification procedures pursuant to 40 C.F.R. § 270.41; and (2) whether the Final Permit improperly allows the Region to impose “interim measures” upon the company without ensuring that such measures are used only in situations of immediate threat to human health or the environment. Further, in a motion filed seven months after its petition for review, R & H seeks to raise the additional issue of whether the Region can impose interim measures without first instituting formal permit modification procedures pursuant to 40 C.F.R. § 270.41.

Held: (1) The Final Permit need not be revised to require invocation of formal permit modification procedures before the Region can obligate the company to investigate newly discovered SWMUs and new releases. In accordance with the applicable regulations at 40 C.F.R. § 270.41 and the Board’s holding in *In re General Electric*, 4 E.A.D. 615, 623-27 (EAB 1993), the imposition of investigatory requirements does not justify or warrant a change in the Final Permit terms and therefore does not require the use of permit modification procedures. The requirement for R & H to investigate newly discovered SWMUs and new releases, even if based upon new information that only became available after permit issuance, is in accordance with the Final Permit’s original terms.

R & H also fails to carry its burden of demonstrating that the Final Permit fails to protect its due process rights in the event it is required to carry out such investigatory work. In its petition for review, the company merely repeats its earlier objections without demonstrating why the Region’s prior response to those objections was clearly erroneous. In any event, consistent with the Board’s holding in *In re General Electric*, 4 E.A.D. 615, 627-40 (EAB 1993), the Final Permit does not deny R & H due process. The Final Permit’s dispute resolution provision, which is available to R & H in the event it wishes to challenge inves-

tigatory requirements, contains all the necessary features the Board found sufficient to protect the permittee's due process rights in *General Electric*, which involved the imposition of investigatory requirements similar to those at issue in this case.

Finally, RCRA section 3004(u), 42 U.S.C. § 6924(u), which authorizes the Agency to impose corrective action on permittees, does not require the Agency to institute permit modification procedures or issue a new permit each time the Agency wishes to impose corrective action, including the investigatory requirements at issue in this proceeding. In accordance with Agency interpretations of section 3004(u), final permits may be written to address future contingencies (such as the discovery of new SWMUs or new releases, as in the instant case) since the obligation to conduct corrective action is a continuing one.

(2) R & H's objections to the interim measures requirement in the Final Permit, as stated in its petition for review, are moot because the Region has agreed to revise the Final Permit to incorporate the language proposed by R & H to ensure that interim measures are used only in situations of immediate threat to human health and the environment. The Final Permit is remanded so that the Region can proceed to incorporate this language into the Final Permit.

(3) R & H's additional objection, raised in its supplemental motion, that the imposition of interim measures requires formal permit modification is untimely and was not preserved for review.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

I. BACKGROUND

On April 16, 1998, Rohm and Haas Company ("R & H") filed a petition for review ("Petition") of a final permit decision ("Final Permit") issued by U.S. Environmental Protection Agency Region IV ("Region") on March 2, 1998, requiring R & H to implement various corrective actions at its facility in Knoxville, Tennessee ("Facility"), including requirements to investigate and correct identified and potential releases of hazardous waste or constituents at the Facility. The Region imposed these corrective action requirements pursuant to its authority under the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901-6992k.¹

¹ Under RCRA § 3004(u), 42 U.S.C. § 6924(u), permits issued after November 8, 1984, shall require:

[C]orrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter * * *.

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The Final Permit was accompanied by the Region's response to comments submitted by R & H on a draft permit that the Region had circulated for public review. No comments were received from the general public during the 45-day comment period; the only comments received were from R & H. *See* Region 4's Response to Petition for Review ("Region's Response"), Ex. B (Region 4's Response to Comments (Feb. 3, 1998)) ("Response to Comments").

In response to a request by this Board ("Board" or "EAB"), the Region, on November 5, 1998, filed a response to R & H's petition for review. *See* Region's Response.² In its response to the petition, the Region reported that as a result of negotiations between the parties, the parties had managed to resolve all but two of the seven issues that R & H had originally raised in its petition for review.³ Region's Response at 4. Subsequent efforts to resolve the remaining issues were not successful.⁴

In addition, on November 3, 1998, R & H filed a motion seeking leave to file a supplement to its petition for review, along with an attached supplement. *See* Rohm and Haas Company's Motion for Leave to File Supplement to Petition for Review ("Motion"); Rohm and Haas Company's Supplement to Petition for Review. As justification for supplementing its petition, R & H stated that its recent discovery that the Region allegedly planned to require it to implement certain interim measures at the Facility constituted "new information" that "may necessi-

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The Final Permit cites the Agency's "omnibus authority," RCRA § 3005(c)(3), 42 U.S.C. § 6925(c)(3), as an additional source of authority for corrective action requirements in the Final Permit. *See* Final Permit Condition I.G.2. Under this authority, which applies to permits for treatment, storage, or disposal of hazardous waste:

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.

² Citing ongoing settlement negotiations between the parties, the Region twice sought and obtained leave from the Board to extend the time period to respond to the petition for review beyond the customary 45-day time period.

³ A set of stipulations signed by counsel for R & H and the Region on October 3, 1998, and November 4, 1998, respectively, contained the parties' agreement on five of the seven issues originally raised by R & H in its petition for review. In their stipulations, the parties agreed to incorporate the changes contained therein into the previously issued Final Permit and R & H withdrew the resolved issues from its petition. *See* Region's Response, app. D (Stipulations). These revisions are contained in a modified version of the Final Permit attached to the Region's Response. *See* Region's Response, Ex. E (Modified HSWA Permit with Proposed Changes).

⁴ At the joint request of the parties, the proceedings were further stayed from February 2, 1999, through September 30, 1999, at which time a Status Report filed by the Region stated that the parties had "failed to come to an agreement with respect to the two issues remaining on appeal" and asked the Board to render a decision as to those two remaining issues. Status Report at 2.

tate relief in addition to that which Rohm and Haas requested in its [petition for review].” Motion at 2.⁵ On November 12, 1998, the Region filed a brief opposing R & H’s Motion. *See* Region 4’s Motion in Opposition to Rohm and Haas Company’s Motion for Leave to File Supplement to Petition for Review. On November 16, 1998, R & H in turn filed a response to the Region’s brief opposing the company’s previous motion to supplement its petition for review. *See* Rohm and Haas Company’s Response to Region 4’s Opposition to Motion for Leave to File Supplement to Petition for Review.

II. DISCUSSION

A. *Issues for Which R & H Seeks Review and the Board’s Standard of Review*

With the parties having reached a negotiated settlement on most of the issues originally contested and those settled issues having been withdrawn by R & H, *see supra* note 3, R & H’s objections to the Final Permit terms, as set forth in its petition for review, are limited to the following two issues:

- (1) Whether the Region, pursuant to its corrective action authority, can mandate investigation of newly discovered Solid Waste Management Units (“SWMUs”),⁶ and of newly discovered releases at existing SWMUs and Areas of Concern (“AOC”)⁷ not otherwise subject to fur-

⁵ R & H claims that the Region, on October 16, 1998, informed the company that it would be required to carry out interim measures to address groundwater contamination at the Facility. Motion at 2. The Region has characterized its action as a request for a “voluntary interim measure” since the Region states that its authority to impose interim measures has been stayed during the pendency of this appeal. Region’s Motion in Opposition to Rohm and Haas Company’s Motion for Leave to File Supplement to Petition for Review at 3-4.

⁶ RCRA section 3004(u), 42 U.S.C. § 6924(u), requires corrective action “for all releases of hazardous waste or constituents from any *solid waste management unit* at a treatment, storage, or disposal facility seeking a permit under this subchapter” (emphasis added). The Final Permit defines a SWMU to include:

any unit which has been used for the treatment, storage, or disposal of solid waste at any time, irrespective of whether the unit is or ever was intended for the management of solid waste.

Final Permit Condition I.G.14.

⁷ The Final Permit defines an AOC as:

any area having a probable release of a hazardous waste or hazardous constituent which is not from a solid waste management unit and is determined by the Regional Administrator to pose a current or potential threat to human health or the environment. Such areas of concern may require investigations and remedial action as required under Sec-

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ther action under the Final Permit, without instituting formal permit modification procedures. Petition at 31-32. R & H contends that such investigation requires a permit modification as set forth at 40 C.F.R. § 270.41, and that the lack of such procedures violates the company's due process rights and is an abuse of the Agency's discretion. Petition at 31-33.

(2) Whether the Final Permit's terms authorizing the imposition of interim measures⁸ constitute an abuse of Agency discretion. The company maintains that, contrary to Agency policy, the Final Permit's definition of "interim measures," *see supra* note 8, as well as provisions describing their implementation, do not ensure that such measures are used only in situations of immediate threat to human health or the environment. To correct this alleged deficiency, the company proposes that the Region incorporate into the Final Permit a list of factors developed by the Agency to guide use of interim measures, which factors, according to the company, are "based on concerns regarding an imminent threat that requires near term action." *See* Petition at 33-35. As noted below, the Region has now agreed to incorporate such language.

Further, in its "Motion for Leave to File Supplement to Petition for Review," R & H seeks to raise the additional issue that the Final Permit fails to provide for formal permit modification procedures in the imposition of interim measures as allegedly required by 40 C.F.R. § 270.41, and that the absence of such procedures in this context violates the company's due process rights. *See* Motion at 1-2.

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. 40 C.F.R. § 124.19; *see, e.g., In re Austin Powder Co.*,

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tion 3005(c)(3) of the Resource Conservation and Recovery Act and 40 C.F.R. § 270.32(b)(2) in order to ensure adequate protection of human health and the environment.

Final Permit Condition I.G.2.

⁸ The Final Permit defines "interim measures" as:

actions necessary to minimize or prevent the further migration of contaminants and limit actual or potential human and environmental exposure to contaminants while long-term corrective action remedies are evaluated and, if necessary implemented.

Final Permit Condition I.G.8.

6 E.A.D. 713, 715 (EAB 1997); *In re Johnston Atoll Chem. Agent Disposal Sys.*, 6 E.A.D. 174, 178 (EAB 1995); *In re Allied-Signal*, 5 E.A.D. 291, 292 (EAB 1994). The preamble to section 124.19 states that “this power of review should only be sparingly exercised,” and that “most permit conditions should be finally determined at the Regional level * * *.” 45 Fed. Reg. 33,412 (1980). The burden of demonstrating that review is warranted is on the petitioner. 40 C.F.R. § 124.19(a); *see also Johnston Atoll*, 6 E.A.D. at 178.

As we discuss below, we deny review on R & H’s first objection. On its second objection, we remand so that the Region, as it has agreed, can proceed to incorporate into the Final Permit the specific factors proposed by R & H to assure that interim measures will only be used in situations of immediate threat to human health or the environment. We deny review, as explained below, on the additional issue R & H seeks to raise in its Motion regarding interim measures because this issue has not been preserved for review.

B. Analysis of R & H’s Claims

1. Requirements to Investigate Newly Discovered SWMUs and Newly Discovered Releases from SWMUs and AOCs Not Subject to Further Action

Final Permit Condition II.B.4 would authorize the Region to require R & H to investigate any SWMUs the company discovers during the term of the Final Permit upon the Region’s determination that such investigation is necessary. Under Final Permit Condition II.C.2, the Region can also require the company to investigate newly discovered releases from existing SWMUs and AOCs⁹ that are not currently subject to further action under the Final Permit, based on the same necessity determination.¹⁰ The Region can mandate, revise, and approve the above investigations, including Remedial Facility Investigations (“RFIs”)¹¹ and confir-

⁹ The Final Permit identifies specific SWMUs and AOCs requiring further investigatory work, *see* Final Permit, app. A at 1, 4-5, as well as SWMUS and AOCs “requiring no further action at this time.” *See id.*, app. A at 2-3.

¹⁰ The Final Permit imposes upon R & H the obligation to notify the Region of new SWMUs “discovered during the course of groundwater monitoring, field investigations, environmental audits, or other means.” Final Permit Conditions II.A.4, II.B.2. The Final Permit also requires R & H, during the course of these same activities, to report any releases from already identified AOCs and SWMUs for which further investigation was not previously required under the Final Permit. Final Permit Condition II.C.1.

¹¹ According to Agency guidance on corrective action, an RFI is undertaken when previous investigation has revealed a potentially significant release of hazardous waste or constituents. The purpose of an RFI is to characterize and identify the nature and extent of contamination at a facility. *See* Advance Notice of Proposed Rulemaking (“ANPR”), 61 Fed. Reg. 19,432, 19,443 (1996) (describing the corrective action process).

matory sampling,¹² without instituting formal permit modification procedures. *See* Final Permit Conditions II.B.4, II.C.2.

We find that R & H is incorrect in asserting that requiring investigations of newly discovered SWMUs and releases necessitates formal permit modification procedures in accordance with 40 C.F.R. § 270.41, on the grounds that such investigations would be predicated upon “new information” not available at the time of final permit issuance. *See* Petition at 31-32. The Region maintains that R & H’s claim, as stated, is insufficient to trigger the requirement for a permit modification under section 270.41. Response to Comments at 8-9; Region’s Response at 8-9. We agree.

In situations involving the Region’s receipt of information related to a permitted facility, 40 C.F.R. § 270.41 provides for Agency-initiated permit modifications only under the following conditions: (1) where the information was not available at the time of permit issuance; *and* (2) where the information would have justified the application of permit conditions that are different from those in the existing permit. *See* 40 C.F.R. § 270.41(a)(2).

In *In re General Electric*, 4 E.A.D. 615 (EAB 1993), we examined a similar claim by a permittee who contended that the revision by Region I of the permittee’s “interim submissions” (which consisted of implementation plans and reports on RFIs, corrective measures, interim measures, and other corrective action) necessitated formal permit modification.¹³ There, citing 40 C.F.R. § 270.41, we held that modification was not in order because the requirements would not warrant or justify changes in the terms of the permit. *Gen. Elec.*, 4 E.A.D. at 624-25. Rather, in making this determination, we noted that although the incorporation of such revised submissions as enforceable parts of the permit would change the existing permit, that process would occur automatically through the operation of the existing permit and thus did not satisfy one of the necessary conditions for requiring permit modification under § 270.41. *Id.* at 624-25; *see also In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 721-22 (EAB 2000) (holding that incorporation into final permit of plans and reports detailing interim corrective measures

¹² As explained in Agency corrective action guidance, the purpose of confirmatory sampling is to confirm the existence of suspected releases, and eliminate from further consideration and study releases that have not occurred or have been adequately remedied. *See* ANPR, 61 Fed. Reg. at 19,443. Confirmatory sampling is designed to precede the RFI, *see supra* note 11, so that site characterization conducted at the RFI stage can “focus * * * [on] areas and releases and exposure pathways which constitute the greatest risks or potential risks to human health and the environment * * *.” *See* 61 Fed. Reg. at 19,444.

¹³ The “interim submissions” in *General Electric* were subject to revision and approval by Region I and, once approved, became enforceable obligations of the permit. Thus, upon Region I’s approval of an interim submission, the permittee would be required to implement any investigation or other corrective action proposed therein. *Gen. Elec.*, 4 E.A.D. at 617-19.

would not trigger permit modification procedures because incorporation process would merely fulfill original permit terms). Similarly, as in *General Electric*, the requirements in the Final Permit at issue here to investigate new SWMUs and new releases from AOCs and SWMUs are in accordance with the original terms of the permit, *see* Final Permit Conditions II.B.4 and II.C.2, and thus the requirement to conduct further investigations (such as confirmatory sampling and RFIs) — even if based on new information that only became available after permit issuance — would not constitute grounds for a permit modification under 40 C.F.R. § 270.41.

We also reject R & H's claim that the Final Permit's failure to provide for formal permit modification before imposing investigatory requirements on newly discovered SWMUs and new releases from SWMUs and AOCs violates the company's due process rights. *See* Petition at 32. R & H fails to demonstrate specifically how the Final Permit terms fail to provide it with sufficient due process, and cites no relevant authority in making this claim. Rather, R & H merely explains that formal permit modification would provide the company an opportunity to comment on investigatory requirements and obtain judicial review, and suggests that since requirements to investigate already identified SWMUs and AOCs, as well as newly-identified AOCs, benefit from the more extensive procedural protections under the Final Permit, then so should the company's obligation to investigate new SWMUs and new releases likewise benefit from expanded procedural protection.¹⁴ *Id.*

In responding to R & H's comments on the draft permit, the Region noted that the Final Permit "on its face provides an opportunity for adequate due process because Rohm and Haas will be able to make its views known through initial submissions as well as subsequent communications with EPA, and should receive reasoned responses to those views."¹⁵ The Region also noted that "[t]he dispute

¹⁴ The Final Permit contains a number of SWMUs and AOCs identified for further investigation. *See* Final Permit, app. A at 1, 3-5. The regulations at 40 C.F.R. part 124, which provide the opportunity for EAB review, apply to issuance of the Final Permit, including conditions pertaining to identified SWMUs and AOCs. Final Permit Condition II.B.1 requires the Region to initiate permit modification in accordance with regulations at 40 C.F.R. § 270.41 before obligating R & H to further investigate AOCs discovered during the term of the Final Permit. These regulations provide for expanded procedures and the opportunity for EAB review.

¹⁵ In its response to the Petition, the Region specifies that R & H would have opportunities to submit its views on and affect the course of the investigatory process set forth in the Final Permit. These include: (1) commenting upon new SWMUs in a "SWMU Assessment Report" that the company must submit upon discovering and reporting SWMUs, *see* Region's Response at 9; Modified Final Permit at 14 (Permit Condition II.B.3); (2) proposing "risk-based concentrations or other investigative endpoints" in order to limit the scope of investigations of new SWMUs and new releases from SWMUs and AOCs, Region's Response at 10; *see* Final Permit Conditions I.I.E.1.c, I.I.E.3.b; and (3) proposing "alternative action levels" to limit the scope of corrective action on new SWMUs and

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resolution section of the permit, Condition II.L, further provides the permittee the opportunity for due process in the event that the permittee disagrees with EPA's determination on submissions."¹⁶ Response to Comments at 9. R & H, in its petition for review, has simply repeated its claim that the Final Permit violates due process without identifying specific due process shortcomings in the Final Permit. As the Board has previously stated in denying permit reviews, a petitioner may not simply reiterate its previous objections to a draft permit. Rather, a petitioner must demonstrate why the permit issuer's response to the objections (the basis for its decision) is clearly erroneous. *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996) (quoting *In re LCP Chemicals-New York*, 4 E.A.D. 661, 664 (EAB 1993)); *see also In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997) (rejecting review of RCRA permit on particular issue because petitioner simply reiterated previous objections to a draft permit). Thus, R & H has failed to carry its burden of showing that the Region's assurances of due process protection are erroneous, and thus review of this issue is denied on this basis.

In any event, we find that the Final Permit satisfies due process standards following the reasoning we adopted in *General Electric*, where the permittee also challenged the lack of formal permit modification procedures as a violation of its due process rights. Using as guidance *Mathews v. Eldridge*, 424 U.S. 319 (1976), which established a three-part test for determining the sufficiency of due process in a particular context,¹⁷ we found that the Agency's provision of a dispute resolu-

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new releases from existing SWMUs and AOCs, Region's Response at 10; Final Permit Condition II.E.3.c.

¹⁶ The Final Permit's dispute resolution provision would allow R & H to challenge the Region's "revision of a submittal or disapproval of any revised submittal required by the [Final] [P]ermit." Final Permit Condition II.L. Following receipt of such revision or disapproval, R & H would have 30 days to notify the Region of the "specific matters in dispute, the position the Permittee asserts should be adopted as consistent with the requirements of the [Final Permit], the basis for the Permittee's position, and any matters considered necessary for the Region's determination." Final Permit Condition II.L.1.a. Upon receipt of R & H's notification, the parties would have an additional 30 days "to meet or confer to resolve any disagreement." R & H must comply with any terms the parties agree to or — in the case they fail to agree — with the Region's decision on the dispute, which must be in writing. Final Permit Conditions II.L.1.c.-d. The Waste Management Division Director, the same person who issued the Final Permit, is the final decisionmaker on the dispute. Final Permit Condition II.L.1.d.; *see infra* note 18.

¹⁷ The Supreme Court offered the following three-part test for determining what process is due in a particular context:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 321.

tion provision, with modifications added by our decision, assured sufficient due process in the event of revisions to the permittee's "interim submissions" and that formal permit modification procedures were thus not necessary to satisfy the permittee's due process rights. *Gen. Elec.*, 4 E.A.D. at 627-40.

The dispute resolution provision in Condition II.L of the Final Permit contains all the features we deemed generally sufficient in *General Electric* to protect the due process rights of permittees in cases involving the Region's revision and approval of interim submissions. As in *General Electric*, the dispute resolution provision would enable R & H to meet informally with Regional staff, to submit a written statement explaining the points of disagreement with the terms of any required investigations, and to receive a final written decision by the Region setting forth its reason for the decision. *Gen. Elec.*, 4 E.A.D. at 636-40.

Moreover, the provision contains two features that we recommended as a matter of sound policy in *General Electric*: first, the dispute resolution provision is included in the Final Permit itself, and second, it provides that the Region's decision and a statement of reasons for the decision will be made by the same official who issued the Final Permit. Final Permit Condition II.L.¹⁸

In sum, we are satisfied that the dispute resolution provision will meet R & H's due process rights by providing the company with the opportunity to receive notice of any impending deprivation imposed by the Final Permit and an opportunity to be heard before any deprivation occurs. *See Gen. Elec.*, 4 E.A.D. at 627; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" (citation omitted); *see also Caribe*, slip op. at 36-37 (citing *General Electric* in finding that final permit's dispute resolution provision would provide permittee with sufficient due process before permittee could be required

¹⁸ The Final Permit was issued by Richard D. Green, Acting Director, Waste Management Division. The Final Permit's dispute resolution procedure provides that the written decision on a dispute "shall not be delegated below the Waste Management Division Director." Final Permit Condition II.L.1.d.

to carry out interim corrective measures).^{19,20}

In addition, we deny review of R & H's charge that because the Final Permit requires formal permit modification procedures before the investigation of new AOCs, *see* Final Permit Condition II.B.1, the lack of equivalent procedures for new SWMUs and new releases from SWMUs and AOCs is "a violation of due process" and "an abuse of discretion." Petition at 32; Final Permit Condition II.B.1. R & H failed to raise these arguments during the comment period, and thus these objections were not preserved for review since they were ascertainable below. *See* 40 C.F.R. § 124.13.

Finally, we reject R & H's argument that the failure to provide permit modification procedures before investigating new SWMUs and releases "contradicts" RCRA section 3004(u), 42 U.S.C. § 6924(u), which authorizes corrective action at RCRA sites. In making this argument, the company states that RCRA "requires that corrective action requirements be imposed through the permit." Petition at 32. Assuming that this somewhat opaque statement is intended to mean that the Agency, pursuant to section 3004(u), must either issue or modify a permit each time it wishes to require corrective action at a RCRA facility, such a view is not consistent with prior Agency decisions holding that under the authority of section

¹⁹ We recognize, as we did in *General Electric*, that the imposition of permit terms could theoretically involve such "extraordinarily high financial stakes," that greater procedural protections for permittees would be warranted. *Gen. Elec.*, 4 E.A.D. at 632-33. In *Gen. Elec.*, we adopted the caveat that where the Final Permit's investigatory requirements involve extremely high costs, due process may require the Region to provide more procedural protection than is afforded by the Final Permit's dispute resolution procedure, but that it must be left to the Region to determine on a case-by-case basis which situations warrant such special treatment. *Id.* R & H has not demonstrated that this case imposes any such extraordinary burden.

²⁰ We note that the factual scenario in this case is slightly different from that in *General Electric*. R & H protests the general obligation to conduct further investigations without the benefit of permit modification procedures, *see* Final Permit Conditions II.B.4, III.C.2, whereas in *General Electric*, the permittee protested the obligation to carry out, without such procedures, the specific details of interim submissions as revised by the Agency. *See supra* Part II.B.1 & note 13. In our view, however, any difference in "deprivation" imposed by the two scenarios is not significant enough to warrant, under the *Mathews v. Eldridge* test, *see supra* note 17, protective procedures in the Final Permit different from those we deemed acceptable in *General Electric*. This conclusion is not surprising since the final permits in *General Electric* and the instant case impose the same basic investigatory obligations on their respective permittees. The general obligation to conduct further investigatory work, to which R & H objects, would require it to prepare, as did the permittee in *General Electric*, interim submissions detailing its investigatory tasks, which become enforceable parts of the Final Permit upon the Region's approval. *See* Final Permit Conditions II.B.4, II.C.2, II.D.1, II.D.3, II.E.1.c & II.E.2. Thus, R & H is merely registering its due process objections to the Region's authority at an earlier stage of the investigatory process. It objects to having to prepare any submissions, whereas *General Electric* objected to being obligated to comply with the submissions if they were revised by Region I. However, the overall demands of the investigatory process are basically the same here as those involved in *General Electric*.

3004(u), RCRA permits can be written to address through corrective action future contingencies such as the discovery of new SWMUs or new releases. As the Administrator held in *In re BF Goodrich Co.*:

Nothing in [RCRA] suggests that corrective action should be restricted to an inventory of SWMUs which, at the time of permit issuance, have confirmed (or likely future) releases, thereby ignoring other future releases during the life of the permit. * * * *The statute is best read as requiring the Agency to impose a continuing obligation upon the permittee to correct all future releases at the facility during the permit term where necessary to protect human health and the environment.*

In re BF Goodrich Co., 3 E.A.D. 483, 486 (Adm'r 1990) (emphasis added). In addition, the Agency has stated, in an important source of policy guidance on its corrective action authority, that requirements in RCRA permits to identify and investigate newly discovered SWMUs and releases from SWMUs satisfy "the statutory requirements of 3004(u) and Congressional intent" that the obligation to conduct corrective action "is a continuing one, applying not just to releases that have occurred prior to permit issuance, but also to any releases that occur after permit issuance." See Subpart S Proposal, 55 Fed. Reg. 30,798, 30,849 (July 27, 1990).²¹

The above language in *BF Goodrich* and from the Federal Register is thus consistent with 40 C.F.R. § 270.41 and our holding in *General Electric* that if "new information" does not warrant or justify changes in permit terms (because as in this case, the original permit legitimately covers future contingencies such as investigating newly discovered SWMUs and releases), then permit modification is not required. Therefore, we reject R & H's argument that RCRA section 3004(u) requires the Agency to issue or modify a RCRA permit each time it wishes to impose any corrective action requirement upon a permittee.

²¹ The Agency recently announced that it would withdraw most of the Subpart S Proposal, which it previously had intended to incorporate into a final rule, and instead rely on current regulations, supplemented by current and planned guidance, to implement the corrective action program. See Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, 64 Fed. Reg. 54,604, 54,606 (1999) (partial withdrawal of rulemaking proposal). In its announcement, the Agency also stated that its 1996 ANPR, *see supra* note 11, which updated many aspects of the Subpart S Proposal, would now serve as the "primary corrective action guidance." 64 Fed. Reg. at 54,607 (citing 1996 ANPR, 61 Fed. Reg. 19,432). However, the Agency noted that previous policy guidance documents, such as the Subpart S Proposal, would "still continue * * * to provide guidance for corrective action implementation." *Id.* In accordance with these statements, we will refer in this decision to appropriate portions of the Subpart S Proposal that have not been replaced or superseded by the 1996 ANPR.

In sum, we find that R & H has failed to show that the Region has committed clear error, an abuse of discretion, or a denial of due process by including in the Final Permit provisions mandating investigation of newly discovered SWMUs and new releases without providing for formal permit modification procedures in the imposition of these investigatory requirements. Review is therefore denied on this issue.

2. *The Imposition of Interim Measures in the Final Permit*

Final Permit Condition II.F.1.a provides that, upon notification by the Region, R & H must prepare an Interim Measures (“IM”) Work Plan detailing the objectives of interim measures, procedures for carrying them out, and a schedule of implementation. The Work Plan must be approved by the Region prior to implementation, and the Region can revise a Work Plan before approving it. Upon the Work Plan’s approval, R & H must implement the interim measures contained in the Work Plan. Final Permit Conditions II.F.1-.2. R & H objects that this Final Permit condition, as well as the definition of “interim measures,” *see supra* note 8, do not ensure that interim measures are used only in situations of immediate threat to human health or the environment.

We deny R & H’s request for review of the above interim measures provision because as the Region states, R & H’s objections are “moot.” The Region has now agreed to incorporate into Final Permit Condition II.F.1.a the language proposed by R & H to restrict use of interim measures to situations involving imminent threats.²² Region’s Response at 11-13; Petition at 34. We remand this issue to

²² In its response to R & H’s petition for review, the Region has agreed to incorporate in the Final Permit nine guidance factors for employing interim measures, which factors are taken directly from the Agency’s “Subpart S Proposal.” *See* 55 Fed. Reg. at 30,880. Thus, the Region will add the following language to Final Permit Condition II.F.1.a:

The following factors may be considered by the Regional Administrator in determining whether an interim measure(s) is required:

1. Time required to develop and implement a final remedy;
2. Actual or potential exposure of nearby populations or environmental receptors to hazardous wastes (including hazardous constituents);
3. Actual or potential contamination of drinking water supplies or sensitive ecosystems;
4. Further degradation of the medium which may occur if remedial action is not initiated expeditiously;
5. Presence of hazardous wastes (including hazardous constituents) in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

Continued

the Region so that it can proceed to incorporate these promised revisions into the Final Permit.

3. *R & H's Additional Challenge to Interim Measures Provision*

In its November 3, 1998 "Motion for Leave to File Supplement to Petition for Review," R & H also seeks to challenge the interim measures condition for failing to provide for formal permit modification pursuant to 40 C.F.R. § 270.41 and for denying its due process rights. In seeking to file the Supplement attached to the Motion, the company claims that it had just learned that the Region intended to impose an "interim measure for groundwater" at the Facility and that this new information justifies supplementing its petition for review to state its objections. *See* Motion at 1-2. While R & H states these objections in connection with an alleged interim measure to address groundwater contamination, the issue the company raises is the more generic one of whether interim measures can be imposed without a permit modification. Because the company is raising this issue for the first time in its Motion, and because it was previously ascertainable, we deny review of this issue and thus deny the company's Motion.

The regulations governing these procedures at 40 C.F.R. part 124 make clear that:

All persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their positions by the close of the public comment period (including any public hearing) under § 124.10.

40 C.F.R. § 124.13.

Further, a petition for review must be filed within thirty days of permit issuance and "shall include a statement of the reasons supporting that review, includ-

(continued)

6. Presence of high levels of hazardous waste (including hazardous constituents) in soils largely at or near the surface, that may migrate;
7. Weather conditions that may cause hazardous wastes (including hazardous constituents) to migrate or be released;
8. Risks of fire or explosion, or potential for exposure to hazardous wastes (including hazardous constituents) as a result of an accident or failure of a container or handling system; and
9. Other situations that may pose threats to human health and the environment.

See Region's Response at 11-13.

ing a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations * * *.” 40 C.F.R. § 124.19(a). R & H has given no legally cognizable reason for not including this new issue in its original petition, and its attempt to raise it seven months later is untimely in light of the thirty-day requirement of § 124.19(a).

The Final Permit makes clear that the revision and approval of interim measures does not require formal permit modification. For example, the Final Permit specifies that:

The IM Work Plan must be approved by the Regional Administrator * * * prior to implementation. * * * If the Regional Administrator disapproves the IM Work Plan, the Regional Administrator shall either (1) notify the Permittee in writing of the IM Work Plan’s deficiencies * * *, (2) revise the IM Work Plan * * *, or (3) conditionally approve the IM Work Plan and notify the Permittee of the conditions.

Final Permit Condition II.F.1. This language makes evident that the Final Permit does not prescribe permit modification procedures when imposing interim measures. Thus, we conclude that there was sufficient information in the public record to alert R & H of this fact, and that therefore the company waived its objections by not having raised them earlier.

Despite the fact that R & H’s present concerns were reasonably ascertainable, the company clearly failed to object to the Final Permit’s not requiring formal permit modification procedures before the imposition of interim measures. In its comments on the Draft Permit, R & H emphasized that the Draft Permit lacked provisions for ensuring that the interim measures would be adopted only in situations involving urgent need and imminent harm. *See* Response to Comments at 15. However, the company failed to use this occasion to object to the fact that the Final Permit did not require formal permit modification in relation to interim measures.

The company now insists that it had in fact raised the need for permit modification procedures below by including within its suggested language for addition to the permit a statement that the procedure for imposing interim corrective measures “shall be in accordance with 40 C.F.R. § 270.41.” *See* Rohm and Haas Company’s Response to Region 4’s Opposition to Motion for Leave to File Supplement to Petition for Review at 1. However, the company takes this reference to RCRA permit modification requirements out of context because the company’s language instead addressed the need for permit modification when imposing *final corrective measures*. The company’s comments read in whole: “Final approval of corrective action which is *achieved* by interim corrective measures shall be *in*

accordance with 40 C.F.R. § 270.41." See Region's Response, Ex. A at 12 (Comments from Petitioner (May 23, 1997)) (emphasis added). The sentence syntax and the use of the word "achieved" in the past tense clearly convey that it is the act of final approval of corrective measures — not the interim measures themselves — that will require use of permit modification procedures.²³

Accordingly, we do not believe this language was intended to raise an issue as to interim measures. It is significant that nowhere in the discussion of the reasons for its suggested language did R & H discuss the issue of procedures for imposing interim measures, only the need for the nine factors that the Region has now agreed to incorporate into the Final Permit.

Because R & H's objection to the absence of permit modification procedures for interim measures in the Final Permit was not preserved for review, its Motion seeking review of this additional issue is denied.

III. CONCLUSION

The Final Permit is remanded to Region IV to proceed with the agreed-upon revision of Final Permit Condition II.F.1.a (interim measures).²⁴ In all other respects, R & H's petition for review is denied. Further, R & H's Motion for Leave to File Supplement to Petition for Review is denied.

So ordered.

²³ Even if R & H had raised this issue during the public comment period, as it claims, we would still deny review since, as previously noted, this issue had to be raised in the petition for review — which it was not — in order to be considered for review.

²⁴ Although 40 C.F.R. § 124.19(c) 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 to be addressed on remand.