IN RE ENVIRONMENTAL WASTE CONTROL, INC.

RCRA Appeal No. 92-39

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided May 13, 1994

Syllabus

Petitioner Environmental Waste Control, Inc., (EWC) seeks review of the federal portion of a permit issued by U.S. EPA Region V under the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k. EWC's petition raises the following eighteen issues for review concerning the permit conditions: (1) use of terms in the "Permit Description" that are alleged to be inconsistent with the underlying RCRA regulations; (2) modification of the 40 C.F.R. § 270.30 "standard conditions"; (3) modification of the exemption for "federally permitted releases" under CERCLA; (4) extension of the record retention period; (5) waste minimization requirements; (6) requirement that EWC provide a list of its wastes subject to federal land disposal restrictions; (7) various challenges to the corrective action conditions of the permit, including lack of a dispute resolution process; (8) designation of product storage tank areas as Solid Waste Management Units (SWMUs); (9) submission of air dispersion modeling and ambient air monitoring results; (10) submission of groundwater monitoring data; (11) designation of an oil/water separator as a SWMU; (12) allegedly inconsistent reporting requirements concerning new SWMUs; (13) provision for disapproval of a Remedial Facility Investigation final report; (14) absence of "action levels" that trigger corrective action requirements; (15) provision for disapproval of a Corrective Measures Study final report; (16) incorporation of State license provisions in permit; (17) applicability of future air emission regulations; and (18) Schedule of Compliance.

Held: The permit is remanded to the Region for further action with respect to some of issues raised by EWC. In particular, the Board concludes that: (1) the Region must provide adequate justification for the imposition of waste minimization requirements on EWC; (2) the Region should include a dispute resolution provision in EWC's permit; (3) the designation of EWC's North Tank Farm as a SWMU must be reevaluated to determine whether all tanks contain waste oil, or whether the Region has some other basis for requiring corrective action for all tanks; (4) the Region must explain why it deviated from the Agency's proposed Subpart S regulations in refusing to establish "action levels" in the permit; and (5) the Region must provide an appropriate legal basis for imposing future air regulations on EWC, or delete the condition from the permit. In all other respects, EWC has failed to establish that review of the petition is warranted, and review is accordingly denied.

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

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Environmental Waste Control, Inc. (EWC) filed a petition seeking review of the federal portion of a permit issued by U.S. EPA Region V on November 23, 1992, under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k.[1] At the Board's request, the Region filed a response to EWC's petition.

According to information contained in the administrative record, EWC began treating the wastes of off-site generators in 1971. EWC's facility occupies approximately 3.8 acres of land in Inkster, Michigan. EWC utilizes four waste treatment processes at the facility: (1) reclamation of usable oils; (2) reduction of the water and solids content of contaminated solvents; (3) neutralization of corrosive wastes (including waste pickle acids), and the precipitation of metals in Extraction Procedure (EP) toxic wastes; and (4) destruction of cyanide-bearing wastes. In addition, the facility has a wastewater pretreatment system for treating liquid wastes prior to discharge in accordance with National Pollutant Discharge Elimination System (NPDES) requirements. Sludge from the pretreatment system is disposed of off-site.

On appeal, EWC challenges eighteen requirements of the permit issued by Region V. EWC's issues on appeal may be summarized as follows: (1) the Permit Description/Authorizing Signature section of the permit impermissibly expands the grounds for which the permit may be terminated, revoked and reissued, or modified, and imposes information submission requirements that are inconsistent with the applicable regulations; (2) the permit language impermissibly modifies the "standard conditions" found at 40 C.F.R. § 270.30; (3) the Region exceeded its authority by modifying the statutory exemption for "federally permitted releases" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); (4) the permit should not allow EPA to extend the period during which EWC must retain certain records; (5) the Region cannot impose waste minimization requirements on EWC; (6) the Region cannot require EWC to maintain and provide a list of wastes subject to federal land disposal

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

restrictions; (7) the corrective action conditions of the permit are based on unpromulgated policies and guidance, do not address remedial measures to be taken by EWC in accordance with State requirements, do not provide for a dispute resolution process, and improperly reserve to EPA the right to oppose requests by EWC to have the permit modified to be consistent with future corrective action regulations which may enacted; (8) the permit erroneously designates certain product storage tank areas as Solid Waste Management Units (SWMUs) for corrective action purposes; (9) EWC should not be required to submit air dispersion modeling and ambient air monitoring results to EPA; (10) EWC should not be required to submit groundwater monitoring data to EPA; (11) the permit erroneously designates the facility's oil/water separator as a SWMU; (12) the requirement that EWC provide EPA with information regarding newly discovered SWMUs is inconsistent with other reporting requirements in the standard conditions of the permit; (13) the permit should not authorize EPA to disapprove the RFI final report if the RFI is implemented in accordance with the workplan; (14) EWC should not have to seek a permit modification of the compliance schedule upon a determination by EPA that corrective action is not required, and the permit should establish action levels that will trigger corrective action requirements; (15) the permit should not authorize EPA to disapprove the CMS final report if the CMS is implemented in accordance with the workplan; (16) the permit should specify which provisions of the Michigan Hazardous Waste Management Act (Act 64) license are incorporated in the permit with respect to management of Toxicity Characteristic (TC) wastes; (17) the permit should not state that EWC will be subject to future RCRA air emission regulations that have not yet been enacted; and (18) the Schedule of Compliance imposes unreasonable requirements on EWC.

II. *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to § 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the Petitioner. *See, e.g., In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 4 (EAB, Nov. 23, 1993). As explained in detail below, we conclude that EWC has met this burden with respect to some of its objections, and we accordingly remand certain portions of the permit to the Region for further action consistent with this order. In other respects, EWC's petition must be denied.

A. *Permit Description/Authorizing Signature*

The introductory portion of the permit states in part that "*any inaccuracies* found in [the permit application] *may be* grounds for the termination, revocation and reissuance, or modification" of the permit, and that EWC must inform EPA of deviations or changes in such information "as soon as the Permittee becomes aware of such deviation or changes." Permit at 2 (emphasis added). EWC objects to this provision on the grounds that the language is inconsistent with 40 C.F.R. §§ 270.41 and 270.43. Section 270.43 identifies as "cause" for termination of the permit, *inter alia*, the "[p]ermittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time." 40 C.F.R. § 270.43(a)(2). Section 270.41 includes as cause for modification or revocation and reissuance of the permit the grounds for termination set forth in § 270.43. In addition, EWC contends that 40 C.F.R. § 270.30(1)(11) requires supplementation of information "promptly" after the permittee becomes aware of additional information or inaccuracies in the original submission, rather than "as soon as" the permittee becomes aware. Petition at 14.

The Region argues that this provision is not a permit "condition" because it is found in the "Permit Approval" section of the permit, and that the language concerning supplementation of information simply clarifies the timeframe within which supplementation must occur. Response to Petition at 5-6.[2]

We agree that the Region's use of the term "any inaccuracies" in this provision, standing alone, could be read as broadening the class of acts that may result in permit termination, revocation and reissuance, or modification, beyond the scope of the circumstances contained in §§ 270.41 and 270.43, as quoted above. However, the "Permit Conditions" portion of the permit also includes Permit Condition I.B., which states that the permit may only be "modified, revoked and reissued, or terminated *for cause*," consistent with 40 C.F.R. § 270.30(f). Any alleged grounds for permit modification, revocation and reissuance, or termination must therefore be reviewed against this narrower regulatory standard in determining whether cause actually exists for a modification. In view of the permit's inclusion of Condition I.B., we conclude that the broader language in the challenged provision is intended only to define a category of circumstances for which a modi-

[2] The Region did not respond to EWC's comment on the draft permit concerning the grounds for permit modification stated in this provision, nor did it address this issue in its Response to the Petition.

fication *could be considered.* As such, we find it unobjectionable since the Region must still evaluate whether a modification should be required based on the regulatory standard. We likewise find the Region's slight deviation from the language of § 270.30(1)(11) in this section to be unobjectionable. The permit includes Condition I.D.16. which correctly tracks the regulatory standard for supplementation of information set forth in § 270.30(1)(11) (*i.e.* that information must be supplemented "promptly" when the permittee becomes aware of changes). Under these circumstances, EWC's request for review on the basis of the issues raised must be denied.

B. *Use of "Standard Conditions"*

EWC contends that the Region erred by modifying the language of 40 C.F.R. § 270.30 to develop the "standard conditions" of the permit (Conditions I.A. through I.E.). EWC claims that "[t]he redrafting of these conditions is prohibited because 40 C.F.R. 270.30 requires its conditions be incorporated `either expressly or by reference.'" Petition at 15. EWC's claim does not merit review for two reasons. First, EWC ignores Board precedent that explains precisely why it is inappropriate to apply the requirements of 40 C.F.R. § 270.30 inflexibly in the corrective action context. As we explained in *In re General Electric Co.*, RCRA Appeal No. 91-7 (EAB, Nov. 6, 1992), the "standard conditions" of 40 C.F.R. § 270.30 were written for incorporation into permits for hazardous waste treatment, storage, and disposal facilities, and without some tailoring those conditions may not be appropriate in the context of corrective action. *Id.* at 33-34 (remanding HSWA permit adopting "wholesale" § 270.30 conditions, because Region failed to justify or tailor to fit corrective action permit). This is true regardless of whether, as here, the federal portion of the permit addresses the management of TC wastes as well as corrective action. Thus, EWC's objection is misguided as a matter of law.[3]

Second, with two exceptions discussed separately below, EWC has failed to identify any specific "standard condition" that should be reviewed on appeal, or to explain why the Region's decision to impose the condition is clearly erroneous or otherwise warrants review.[4] EWC's objection goes only to the general redrafting of the standard conditions. The Board has made clear that the petitioner bears the

[3] Moreover, EWC does not dispute the Region's contention that some of the standard conditions were redrafted as a result of EWC's comments on the draft permit.

[4] EWC's objections with respect to Condition I.A. and I.D.9. are addressed separately below, under the headings "C. *Effect of Permit*" and "D. *Record Retention.*"

burden of identifying specific questionable permit conditions, and providing argument as to why the Region's decision to impose each questioned condition should be subject to review. *In re LCP Chemicals—New York*, RCRA Appeal No. 92-25, at 5 (EAB, May 5, 1993). Accordingly, EWC's request for review on the basis of the issues raised is denied.[5]

C. *Effect of Permit*

Permit Condition I.A. (a "Standard Condition" derived from 40 C.F.R. §§ 270.4, 270.30(g), and 270.42(g)) describes the effect of issuance of, and compliance with, a RCRA permit. In particular, the condition limits the extent to which permit compliance may be regarded as a defense in an enforcement action. EWC claims that the Region "has no authority to modify the statutory [enforcement] exemption for 'federally permitted releases' under CERCLA" by including the following condition in the permit:

> Compliance with the terms of this permit does not constitute a defense to any order issued or any action brought under * * * Sections 104, 106(a), or 107 of [CERCLA]; or any other law providing for protection of public health or the environment.

EWC misconstrues the nature of this condition. The Board has previously held that the quoted permit language is an "accurate description of applicable law," and therefore denied review of identical permit language. *LCP Chemicals* at 9-10. Rather than "modifying" any rights EWC may have under CERCLA (as EWC claims), the inclusion of such a condition merely puts the permittee "on notice that compliance with a RCRA Subtitle C permit does not bar EPA from taking lawful actions when necessary to protect human health and the environment." *Id.* at 10. Whether EWC will be able to assert that it is not liable under CERCLA because of the "federally permitted release" exemption is simply not an issue that can or should be resolved in EWC's HSWA permit. However, the condition at issue certainly cannot bar EWC from seeking an exemption to which it is otherwise entitled under CERCLA. Accordingly, review on the basis of this issue is denied.

[5] Because we conclude that EWC has not met its burden of establishing that review is warranted in any event, we do not address the Region's contention that EWC did not comment on permit condition I.E. and thus failed to preserve this issue for review.

D. *Record Retention*

EWC objects to Condition I.D.9. (a "Standard Condition" in the permit drawn from 40 C.F.R. §§ 270.30(j)), which requires EWC to retain reports, records and other documents required by the permit for at least three years, with retention of up to five years (the term of the permit) at the request of the Regional Administrator. As it did in its comments on the draft permit, EWC claims that this condition is beyond EPA's authority. EWC is simply wrong. The governing regulation expressly provides that such records must be maintained for a minimum of three years, and that the retention period "may be extended by request of the [Regional Administrator] at any time." 40 C.F.R. § 270.30(j)(2). EWC has offered no argument as to why retention for up to the five-year permit term (if requested by the Regional Administrator) is unreasonable. EWC has failed to meet its burden of establishing that review of this issue is warranted. EWC also claims that the Region erred in crafting Condition I.D.9. because it requires that information be provided "within the time designated by the Administrator." However, Condition I.D.9. contains no such language. Accordingly, EWC's request for review on the basis of this issue is denied.

E. *Waste Minimization*

Permit Condition I.G. imposes the waste minimization requirements of RCRA § 3005(h) on EWC. EWC asserts that § 3005(h) only applies to facilities that "treat" the hazardous waste they generate, and that EWC does not treat the waste it generates. EWC's claim reiterates the comment it made on Condition I.G. of the draft permit during the comment period. In response to EWC's comment, the Region explained that § 3005(h) applies to all facilities that generate waste, and that since EWC generates its own waste, the condition is appropriate. On appeal, EWC adds that it is "illogical" to impose such a requirement on an offsite treatment facility "because the more efficiently the facility operates, the more waste is generated." Petition at 18.

RCRA § 3005(h) provides that:

> Effective September 1, 1985, it shall be a condition of any permit issued under this section for the treatment, storage, or disposal of hazardous waste *on the premises where such waste was generated*, that the permittee certify, no less often than annually, that [it has a program in place to minimize hazardous waste generation and that the permittee's proposed treatment, storage, or disposal methods minimize the threat to human health and the environment.]

RCRA § 3005(h). According to Agency guidance concerning the incorporation of this requirement into permits, the requirement applies to "all RCRA permits for *on-site* treatment, storage or disposal * * * ." Memorandum from Bruce R. Weddle, Director, Permits and State Programs Division to Hazardous Waste Division Directors, Regions I-X (Sept. 11. 1985). This appears to us to be a reasonable interpretation of § 3005(h). In light of this interpretation, it is not apparent, nor does the Region explain, why the waste minimization requirement is applicable to EWC's permit, when EWC is a facility that treats the waste of *off-site* generators. Although the Region recites in its response to comments on the draft permit that "EWC also generates wastes for off-site disposal," Response to Comments at 6, the Region does not explain what these wastes are, or how any of EWC's activities in connection with the waste bring EWC within the ambit of RCRA § 3005(h). The Region must provide an adequate legal and factual basis for this condition. Accordingly, Condition I.G. is remanded, and on remand the Region is instructed to either explain fully why this requirement is applicable to EWC, or delete the condition from EWC's permit.

F. *List of Restricted Wastes*

EWC objects to permit condition II.A.4. which states that EWC "shall prepare and maintain a current list of the hazardous waste codes handled by the facility" that are subject to the land disposal restrictions (LDRs) of 40 C.F.R. Part 268, Subparts B and C, and shall update the list and provide it to EPA upon request. EWC contends that this condition exceeds the Region's regulatory authority. In its response to EWC's comment on this condition, the Region stated that the provision was "an integral part of EWC's reporting process," but did not identify the specific statutory or regulatory authority for imposition of the condition. In its response to the petition, Region V states that although there is no express statutory or regulatory requirement that EWC maintain, update, and provide a list of the LDR wastes it handles, the maintenance of such a list is dictated by "good operating practices" in order to evaluate EWC's compliance with Part 268. Response to Petition at 12.

We interpret the Region's inclusion of this condition as implementing the requirements of Part 268 (which EWC acknowledges apply to it) through an exercise of the legal authority conferred on the Region by 40 C.F.R. § 270.32(b)(1). That section provides that:

> Each RCRA permit shall include permit conditions necessary to achieve compliance with the Act and regulations, including each of the applicable requirements specified in parts 264 and 266 through 268 of this chapter. In satisfying this provision, the [Region] may incorporate appli-

> cable requirements of parts 264 and 266 through 268 of this chapter directly into the permit *or establish other permit conditions that are based on these parts.*

40 C.F.R. § 270.32(b)(1) (emphasis added). This provision confers "broad discretion" on the Regional Administrator, with the sole test of legal sufficiency being whether the permit condition is "based" on the appropriate regulatory provisions and is "necessary to achieve compliance with the Act and the regulations." *In re Velsicol Chemical Corp.*, RCRA Appeal No. 83-6, at 3-4 (Adm'r, Sept. 14, 1984). In view of the broad authority to implement the requirements of Part 268 conferred on the Region by this section, and EWC's failure to show that this condition is not a reasonable application of this section, EWC's claim that Condition II.A.4. is beyond the Region's regulatory authority must be rejected. Accordingly, review on the basis of this issue is denied.[6]

G. *Corrective Action Provisions*

EWC raises four objections to the corrective action provisions found in Condition III. of its permit. Each objection is addressed separately below.

1. *Use of "Unpromulgated Policies and Guidance Documents"*

EWC mounts a broad challenge to the Region's authority to impose any corrective action requirements in the permit. EWC contends that the corrective action conditions:

> [A]re not supported by either EPA's statutory or regulatory authority over SWMUs or the facts relevant to the facility. The conditions are based on unpromulgated policies and guidance documents and, thus, * * * cannot be lawfully included in the Permit. * * * Because EPA is using guidance documents in place of final regulations addressing the issues raised by its corrective action au-

[6] This requirement presents a situation somewhat similar to the one addressed by the Board in *In re GSX Services of South Carolina, Inc.*, RCRA Appeal No. 89-22 (EAB, Dec. 29, 1992). In that case, Region IV attempted to require the permittee to update exposure information required only for the permit application during the permit term. Because the Region identified no legal authority for the condition, the permit was remanded and the Region instructed to remove the condition. *GSX Services*, at 15. *GSX* is distinguishable from the instant circumstance, however, because in *GSX* the governing statute expressly limited the requirement to submit exposure data to the permit application. *Id.* There is no such limiting statute in this case that would preclude the Region from exercising the broad authority granted in § 270.32(b)(1) to craft permit conditions implementing part 268.

> thorities, its actions are by definition arbitrary and capricious.

Petition at 20. EWC's argument is without merit.

The statutory authority for the inclusion of corrective action requirements in RCRA permits is found at RCRA § 3004(u):

> Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, 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, regardless of the time at which waste was placed in such unit. Permits issued under [RCRA § 3005] of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

RCRA § 3004(u). Although the Agency has not yet finalized its proposed Subpart S rules defining the specific procedural and substantive requirements of its corrective action programs,[7] the Agency has implemented the broad authority conferred in § 3004(u) by promulgating 40 C.F.R. § 264.101 (requiring RCRA permittees to institute corrective action "as necessary to protect human health and the environment," and providing that corrective action requirements will be specified in RCRA permits). Thus, there is ample statutory and regulatory authority for the imposition of RCRA corrective action requirements in EWC's permit.

With respect to the Region's reliance on "unpromulgated policies and guidance documents," the Board assumes that EWC is referring to the Agency's proposed Subpart S corrective action regulations, and the *RCRA Corrective Action Plan* (Interim Final), OSWER Directive 9902.3 (June 1988). It is true that the Agency's proposed regulations and guidance documents do not have the force of law. Nevertheless, the Board has held that the Agency "clearly" may "draw[] upon language in proposed regulations such as the Subpart S regulations when writing the terms of an individual permit." *Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 14-15 (EAB, July 29, 1993). The Region must still perform a permit-specific analysis and provide sup-

[7] 55 Fed. Reg. 30,798 (July 27, 1990).

port for the inclusion of a particular condition in an individual permit, and conditions drawn from the proposed rules and guidance can be challenged in individual permit proceedings. *Id.* EWC is thus free to challenge particular conditions which are drawn from proposed regulations and Agency guidance, and which EWC contends lack a sufficient legal or factual foundation for inclusion in its permit. However, with respect to this objection, EWC has failed to identify and challenge any *specific* permit conditions. EWC merely offers a general objection to the Region's reliance on proposed regulations and Agency guidance. EWC has thus failed to meet its burden of demonstrating that review on the basis of this issue is warranted, and review is accordingly denied. *See LCP Chemicals*, at 5.

2. *Remediation Under State License*

EWC argues that the permit is deficient because it does not address remediation which EWC must perform under its Michigan Act 64 license. EWC contends that certain areas designated as SWMUs under the permit (Tank 3 and other portions of the North Tank Farm) will be remediated in accordance with State requirements. EWC acknowledges that "EPA has stated [in its Response to Comments] that it will terminate the corrective action schedule for units which are closed under Act 64," but EWC complains that EPA has not made its statement an enforceable part of the permit.

In its response to EWC's comment on this issue, the Region observed that the Remedial Facility Investigation to be performed under EWC's permit will provide the data necessary to support a Corrective Measures Study to develop corrective measures for the North Tank Farm, which may include "clean closure" as required under Michigan Act 64. Thus, the Region states that:

> [T]he corrective action provisions of the permit for the North Tank Farm do not present any compliance schedules which might be in conflict with the Act 64 License provisions imposed on EWC. EWC should be able to remediate any alleged contamination of the area and submit a report to U.S. EPA certifying cleanup of the alleged contamination. If the U.S. EPA approves of the remediation, the compliance schedules for the corrective action of the North Tank Farm will be appropriately modified.

Region's Response to Comments at 8.

EWC has offered no facts or argument to contradict the Region's conclusion that the corrective action conditions of the permit do not conflict with the Michigan Act 64 license requirements. Because the Region has expressed its willingness to evaluate the remediation efforts undertaken under EWC's State license and modify the corrective action schedule as appropriate, we deny review of the permit on the basis of this issue. *See In re Metalworking Lubricants Co.*, RCRA Appeal No. 93-4, at 6 (EAB, Mar. 21, 1994) (Review denied because Region indicated permittee "can submit work done for the State as a means of at least partially satisfying its permit requirements."); *In re Beazer East, Inc. and Koppers Industries, Inc.*, RCRA Appeal No. 91-25, at 9-10 (EAB, Mar. 18, 1993) (same).

3. *Final Corrective Action Regulations*

EWC states that "it is likely that final corrective action regulations will be promulgated during the term of the Permit," and that

> EWC *may* petition to modify the Permit to incorporate those regulations. Because EWC should be treated in the same manner as like situated facilities who receive their permit after the effective date of the final corrective action regulations, at a minimum, the Permit should state that EPA will not oppose EWC's request to have the Permit modified to make its corrective action conditions consistent with any final corrective action regulations which are promulgated by EPA.

Petition at 22 (emphasis added). EWC's objection to the Region's failure to include such a provision in the permit is founded upon three presuppositions: (1) that final corrective action regulations will be enacted during the term of its permit; (2) that EWC will thereafter elect to petition to modify its permit; and (3) that the Region will oppose EWC's request for modification. Such speculative concerns do not provide a proper basis for review of the Region's decision not to include the requested provision. *See Beazer East*, at 8 (citing *In re Hytek Finishes Co.*, RCRA Appeal No. 88-45, at 2 (Adm'r, Jan. 13, 1989) (Agency administrative appeal procedure should not be used to pursue speculative concerns.)). Accordingly, we deny review of the permit on the basis of this issue.[8]

[8] The procedures and circumstances under which a permittee may seek modification of a RCRA permit are set forth at 40 C.F.R. § 270.42. For example, § 270.42(d)(2)(ii) provides that a "Class 2" modification can be sought when a facility seeks to make "[c]hanges necessary to comply with new regulations." If at some point EWC believes that such a modification is necessary, it can avail itself of the procedures set forth in § 270.42.

4. *Dispute Resolution Provision*

EWC objects to the Region's failure to include a dispute resolution provision in the permit. In response, the Region states that "there already exists sufficient opportunities for EWC to resolve differences and seek changes to its permit." Response to Petition at 14.

Since the filing of EWC's petition, the Board has addressed at length the issue of inclusion of dispute resolution provisions in corrective action permits. In *In re General Electric Co.*, RCRA Appeal No. 91-7 (EAB, Apr. 13, 1993), we held that where the permit allows the Region to revise interim submissions prepared by the petitioner during the corrective action process (as does EWC's permit), as a matter of due process the permit must afford the permittee a hearing on any disputed provision. *Id.* at 16; *Amoco Oil Co.*, RCRA Appeal No. 92-21, at 5-6. We have stated that while the specific procedural safeguards necessary may vary depending upon the particular dispute, the permit's dispute resolution clause must at a minimum:

> (1) afford the permittee the opportunity to submit comments to, and meet with, the regional permitting staff responsible for making any disputed revisions; (2) allow the permittee to submit written arguments and evidence to the person in the Region with the authority to make the final permit decision, i.e., the Regional Administrator or his delegatee; and (3) issue a written response to the evidence and arguments presented by the permittee.

Amoco Oil Co. at 6 (citing *General Electric* at 17, 30). As a matter of policy, the dispute resolution provision should be included in any permit that is not yet final. *Id.* Such is the case with EWC's permit. Accordingly, the permit is remanded, and on remand the Region is ordered to revise the permit to include a dispute resolution provision containing the elements described above, consistent with the Board's previous decisions.

H. *Identification of SWMUs*

Condition III.C.1. of the permit imposes certain requirements on EWC with respect to three sites of alleged soil contamination at EWC's facility: the Diesel Fuel Oil Tanks area; the North Tank Farm (Tanks 1 through 16); and the area between the East Side Tanks and the closed Surface Impoundments. The permit requires EWC to collect and analyze soil samples at these sites to determine whether any hazardous

wastes have migrated to the soil, and to submit an RFI Work Plan with respect to these sites.

EWC initially contends that EPA has "failed to define the term 'SWMU,'" and that EPA therefore has no basis for designating areas as SWMUs. Petition at 23-24. The Agency has, however, set forth a definition of "SWMU" in its proposed Subpart S corrective action regulations, 55 Fed. Reg. 30,798 (July 27, 1990).[9] As noted above, although the proposed regulations do not have the force of law, the Agency has authority to utilize its proposed definitions in crafting individual permit terms. Further, EWC does not object to the particular definition of "SWMU" proposed by the Agency, but rather argues that the areas identified by the Region do not meet the proposed definition. Therefore, we find no validity to the generalized objection based on a lack of a regulatory definition. As to the authority of the Region to regulate particular areas identified by EWC, we will address the status of each of the soil contamination areas separately.

Diesel Fuel Tanks. EWC contends that the Diesel Fuel Tank area is not a SWMU because it is not a "unit" as that term is defined. EWC further argues that any contamination in the area resulted from a release of product (diesel fuel) from a storage tank, and not from the management or release of hazardous wastes. EWC is correct that RCRA regulation usually does not extend to stored raw materials or fuel.[10] It is apparent, however, that the Region's concern is directed toward potential releases or spills of diesel fuel from the tanks, not to the storage of the fuel. "A spill or release of stored materials into the surrounding area would generally constitute 'solid waste' under RCRA." *In re Sandoz Pharmaceuticals Corp.*, RCRA Appeal No. 91-14, at 6 (EAB, July 9, 1992). Although diesel fuel released or spilled from the tank may thus be deemed "solid waste," in order for the area to be regulated under RCRA § 3004(u) it must also be a "solid waste *manage-*

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[9] The proposed Subpart S regulations define "SWMU" as:

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

55 Fed. Reg. at 30,809. The Board has previously found this definition to be "consistent with both the statutory definition of 'solid waste management' and the legislative history concerning units intended for regulation under RCRA § 3004(u)." *General Motors Corp., Delco Moraine Division*, RCRA Consolidated Appeal Nos. 90-24, 90-25, at 5 (EAB, Nov. 6, 1992).

[10] "Solid waste" under RCRA generally refers to *discarded* material, not virgin product. *See* RCRA § 1004(27).

ment unit." *Id.* "The term 'solid waste management unit' includes areas contaminated by routine and systematic releases, but not by a one-time, accidental spill or a passive leak." *Id.* (citing proposed Subpart S regulations, 55 Fed. Reg. 30,809 (July 27, 1990)).

The Region does not argue that "routine and systematic" releases have occurred at this site, and in its Response to Comments acknowledged that "there would still be some question under Section 3004(u) of RCRA as to whether the area is a 'SWMU.'" Response to Comments at 10. Instead, the Region contends that regardless of the SWMU status of the site, the challenged provision is legally supported because the Region's statutory omnibus authority enables it to impose corrective action requirements on non-SWMUs.

It is true that RCRA § 3005(c)(3), the so-called "omnibus provision," provides broad authority to impose corrective action requirements for certain non-SWMUs. *Sandoz Pharmaceuticals*, at 6. However, we stated in *Sandoz* that:

> [T]his authority is not unlimited; by its own terms § 3005(c)(3) authorizes only those permit conditions necessary to protect human health or the environment. Accordingly, the Region may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health or the environment.

Id. at 7. In the context of the Agency's efforts to impose investigative requirements, we have said that "in order to support a permit requirement for further investigation of a particular SWMU or area of concern as part of the RFI workplan, there must be some record evidence of a likely or suspected release warranting additional study." *Amoco Oil Co.*, at 22.

In this case, the Region in its response to comments stated that its omnibus authority allows it to impose "any permit term and condition necessary to protect human health and the environment," and that such authority provided a "sufficient legal predicate" for requiring soil sampling for suspected releases from the Diesel Fuel Tank area. Response to Comments at 10. The Region's reference to its omnibus authority may be viewed as a "shorthand" finding that further investigation of this area is necessary to protect human health and the environment. *See Sandoz Pharmaceuticals*, at 8. Such a shorthand finding can be sufficient to invoke the omnibus authority if it is also supported by a factual basis in the record. We conclude that in this instance the Region's finding is supported by record evidence of a suspected re-

lease at this site. The Region's "Follow-up Visual Site Inspection Report" documented the following observations concerning the Diesel Fuel Tank area:

> This unit consists of two horizontal steel tanks which are located on an unbermed concrete pad in the northeast corner of the facility. A pool of very oily liquid material was observed on two sides of the unit just outside the concrete pad. Also, dark staining and discoloration of the surrounding gravel and soil area were noted. The observed evidence of release could possibly be the result of the transfer operations of fuel oil into tank trucks managed in this unit.

Follow-Up VSI Trip Report, at 2. EWC does not dispute these factual observations. Under these circumstances, we find that the Region properly imposed soil sampling and RFI requirements on EWC for this site, under the Region's omnibus authority to impose requirements to protect human health and the environment.

North Tank Farm. EWC contends that any contamination from one of the tanks in this area (Tank 3) will be addressed through closure under EWC's Michigan Act 64 license, and that the remaining tanks (1, 2, and 4 through 16) are not SWMUs because they are either product tanks or are part of EWC's used oil recycling and production activities. According to EWC, because the area is part of a process that produces a useful product (used oil for resale), any releases in this area are exempt from the definition of "solid waste" under RCRA. Region V contends that all tanks in this area, except Tank 3, are dedicated to the treatment process of *waste oil* materials, and therefore may be regulated as SWMUs.

We agree with the Region that under the applicable regulations, used oil present in the North Tank Farm tanks comprises "solid waste":

> Materials are solid wastes if they are *recycled*—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section.

40 C.F.R. § 261.2(c). Paragraph (c)(3) of that section provides that "spent materials" are solid wastes when they are reclaimed; "spent material" includes "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. § 261.1(c)(1). Contrary to EWC's contention, the use of the used oil in a "production process" in this instance does not remove it from the definition of "solid waste":

> (e)(1) Materials are not solid wastes when they can be shown to be recycled by being:
>
> > (i) Used or reused as ingredients in an industrial process to make a product, *provided the materials are not being reclaimed*[.]

40 C.F.R. § 261.2(e) (emphasis added). In this case, the "product" produced by EWC is the reclaimed oil itself; the material thus remains "solid waste." Pursuant to the Agency's proposed Subpart S regulations, a "SWMU" is "[a]ny discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste." 55 Fed. Reg. at 30,808. Thus, the Region properly designated waste oil tanks on the North Tank Farm as "SWMUs."

According to EWC's permit application, at least 11 of the tanks are utilized for waste oil storage or processing (Tanks 5, 6, and 8 through 16). However, it is unclear from the application whether *all* of the tanks are utilized for waste oil storage or processing operations. For example, the application indicates that Tanks 1, 2, 4, and 7 are used for "oil storage." EWC contends that some of the tanks are product storage tanks. If so then, as noted above with respect to the discussion of the Diesel Fuel Tank area, the Region must articulate some other basis for exercising corrective action authority over the product storage tanks. The Region's response to comments on the draft permit did not conclude that releases from these tanks were sufficiently "routine and systematic" to regulate them as SWMUs, nor did the Region justify the corrective action requirements for this area on the basis of its omnibus authority (although it has made this argument on appeal). Accordingly, we remand this portion of the permit to the Region, and instruct the Region to evaluate whether *all* of the tanks in the North Tank Farm can be regulated as SWMUs because they contain waste oil, or whether some other basis for imposition of corrective action requirements exists for tanks that are used for product storage.

With respect to Tank 3, EWC has failed to rebut the Region's assertion that the corrective action provisions of the permit do not conflict with EWC's Act 64 obligations. Further, the Region stated in its response to comments that it "will make every effort to avoid unnecessary duplications of effort which could delay the corrective action process specified to the Tank 3 area." Response to Comments at 11. Under these circumstances, we conclude that the Region did not err in including Tank 3 in the corrective action requirements imposed on EWC for the North Tank Farm. *See Metalworking Lubricants*, RCRA Appeal No. 93-4, at 6.

Area Between East Side Tanks and Closed Surface Impoundments. EWC claims that the only source of alleged contamination at this site is the East Side Tank Farm, because the surface impoundments were "clean closed" under Act 64 requirements. EWC further claims that the East Side Tank Farm is not a SWMU, because the tanks are part of an oil production process. The Region justified imposition of corrective action requirements for this area on the basis of its omnibus authority. We agree that the factual record supports the Region's finding that the requirements are necessary to protect human health and the environment. The Region's Follow-Up Visual Site Inspection Report observed:

> At the time of the VSI, the unpaved area between the East Side Tanks and the former Hazardous Waste Surface Impoundments was observed to be totally soaked with oily liquid material. Discolored and dark stained soil in the area was also noted.

Follow-Up VSI Report at 2. There is thus record evidence of a likely or suspected release in this area, and the Region's imposition of investigative requirements on EWC was a reasonable exercise of its omnibus authority.

I. *Submission of Air and Groundwater Data*

The permit (Conditions III.C.2. and III.C.3.) requires EWC to submit the results of air dispersion modeling and ambient air monitoring for semi-volatile organic carbon, volatile organic carbon, and metals, and the groundwater monitoring data from EWC's State-required groundwater monitoring system. EWC objects to these requirements as being beyond the scope of the Region's authority, and in contravention of the Region's stated intent to not "'supersede or routinely re-evaluate [releases which are authorized under state air programs].'" Petition at 27 (quoting 55 Fed. Reg. 30,808). EWC contends that it has State permits for air emissions at the facility, and has completed a study of emission sources in conjunction with State and County authorities that demonstrates that no additional pollution controls are necessary. EWC states that it has addressed all significant sources of organic compound emissions, and that State and County authorities have agreed that the facility's metal emissions do not require monitoring. With respect to groundwater monitoring data, EWC contends that EPA's only interest in the data is to determine whether EWC is analyzing the correct parameters using appropriate techniques to detect potential releases from SWMUs.

In response, the Region states that the air and groundwater data are necessary to fully evaluate whether releases from SWMUs have

occurred. In its response to comments on the draft permit, the Region observed that 40 C.F.R. § 264.101 authorizes the Region to require corrective action for releases from all SWMUs to all environmental media. Response to Comments at 13. In its response to the petition for review, the Region also stated that the air data are sought under the Region's RCRA omnibus authority because the Visual Facility Inspection and information received at the public hearing on the draft permit suggested that the facility generates odors that may be the result of harmful fumes. The groundwater data are sought because EWC's permit application disclosed that groundwater under the facility is migrating to the northeast in proximity to the Rouge River. The Region emphasizes (as it did in its response to comments on the draft permit) that it is not presently requiring any new studies or monitoring. It states that it wants only existing data in order to evaluate whether additional monitoring should be required.

In the absence of a demonstration that the conditions imposed by the Region will cause EWC to duplicate unnecessarily its previous efforts, we conclude that EWC's objections to the submission of air and groundwater monitoring data are insupportable. We have denied review in cases challenging similar permit conditions, where the Region has expressed its willingness to take advantage of data developed by a permittee under State permit requirements. *Metalworking Lubricants Co.*, at 6; *Beazer East*, at 9-10. The Region in this case has stated that it is imposing no new monitoring requirements, and that data obtained in satisfaction of State requirements will provide it with a sufficient starting point in its evaluation of potential releases. The Region has further stated that if in the future it decides that additional monitoring or modeling is necessary, it will modify the permit accordingly. We therefore deny EWC's petition for review of these conditions.[11]

J. *Assessment of Underground Oil/Water Separator*

The Oil/Water Separator is an underground tank that processes wastewater from catch basins throughout the facility. Condition III.C.4. of the permit requires EWC to obtain and keep on file a written assessment certified by an engineer that attests to the tank's integrity. If the assessment indicates that the tank is leaking or is unfit for use, EWC may be required to remove any spilled waste and repair the tank

[11] Although the Region did not attempt to justify these conditions on grounds other than 40 C.F.R. § 264.101 and the RCRA omnibus authority, we note that RCRA § 3007 also gives the Agency broad authority to inspect a facility's records relating to its management of hazardous waste. That broad authority is similarly embodied in the "Standard Conditions" of 40 C.F.R. §§ 270.30(h) ("Duty to provide information") and (i) ("Inspection and entry.").

system. EWC must also perform soil sampling to determine if any releases have occurred, and submit an RFI work plan if necessary.

EWC contends that the Oil/Water Separator tank system is not a SWMU, because it is simply a portion of the facility's sewer system that links the facility to the Inkster town sewer system. According to EWC, the material passing through the system meets pretreatment standards, and the Separator performs no waste treatment function at the facility, except possibly to remove oil from water in the event of a "catastrophic spill" from a truck. Petition at 31. EWC has offered no information or argument concerning the integrity of the Oil/Water Separator.

The Region argues that the Separator is a SWMU because it is utilized to receive spills from waste handling and loading/unloading operations (as EWC concedes) and because it receives wastewater from catch basins and run-off outside the containment areas. The RCRA Facility Assessment indicated that "[n]o historical evidence of releases from this unit was identified," but that "[v]isual inspection was difficult since this unit is located underground. The potential for release of hazardous waste or hazardous constituents to soil and groundwater is directly related to the integrity of the unit." Follow-up Visual Site Inspection Report at 2.

The Agency addressed the somewhat unique problems posed by industrial process collection sewers in its preamble to the proposed Subpart S regulations. The Agency expressed its belief that:

> [T]here are sound reasons for considering process collection sewers to be solid waste management units. Such sewers typically handle large volumes of waste on a more or less continuous basis, and are an integral component of many facilities' overall waste management system. Program experience has further indicated that many of these systems, especially those at older facilities, have significant leakage, and can be a principal source of soil and groundwater contamination at the facility.

55 Fed. Reg. at 30,809.

The Board has previously held that structures serving a function similar to EWC's Oil/Water Separator are properly classified as SWMUs subject to corrective action under RCRA § 3004(u). In *Amoco Oil Co.*, we relied on past decisions of the Administrator in concluding that a refinery's "oily" sewers are SWMUs. *Amoco Oil Co.*, RCRA Appeal No.

92-21, at 23-24 (citing *In re Texaco Refining and Marketing, Inc.*, RCRA Appeal No. 89-12, at 4 n.4 (Adm'r, Nov. 6, 1990); *In re Shell Oil Co.*, RCRA Appeal No. 88-48, at 4-5 (Adm'r, Mar. 12, 1990)). In *Amoco Oil* and *Shell Oil*, the structures at issue were underground pipes used to collect and convey wastewater and spills from around the facility. In *Shell Oil*, the Administrator stated:

> I agree with Region X that Shell's Oily Sewer contains solid waste. The statute defines "solid waste management" as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." 42 U.S.C. § 6903(28). This broad definition embraces the carrying of solid waste to or among SWMUs by a sewer system. The word "unit" refers to any contiguous area of land on or in which waste is placed. *See* 47 Fed. Reg. 32,289 (July 26, 1982) (defining "waste management unit"). Because Shell's Oily Sewer meets each of the necessary elements of a SWMU, the Region properly treated it as a SWMU subject to corrective action under RCRA § 3004(u).

Shell Oil, at 4-5 (footnotes omitted).

In view of the lack of evidence confirming the integrity of the system, the fact that the system routinely handles wastewater collected facility-wide and is designed to manage waste spills, and the fact that the Oil/Water Separator is essentially indistinguishable from the SWMUs described in the foregoing cases, we agree with the Region's conclusion that the Oil/Water Separator is a SWMU, and accordingly review is denied on this basis.

K. *Reporting of Newly Identified SWMUs*

Condition III.D. of the permit requires EWC to notify the Region of the existence of newly discovered SWMUs or releases from existing or new SWMUs within 30 days of discovery. EWC objects to this condition, because "it conflicts with or, in essence, has no effect unless it is considered to supersede the standard conditions. For example, if EWC discovers a SWMU, the facility is arguably required to report this information as a revision of incorrect information under Condition I.D.16." Petition at 31-32. The Region states that EWC is "simply mistaken" because "[t]he discovery of a new SWMU is a future event covered under condition III, whereas condition I.D.16 refers to past activities, events and data already provided or reported to U.S. EPA." Response to Petition at 22. Review of the conditions at issue confirms the Region's interpretation. Accordingly,

the Region did not err by refusing to modify Condition III.D., and review of this condition is denied.

L. *Bases for Disapproval of RFI and CMS Final Reports*

Conditions III.F.1. and III.F.3. of the permit allow the Region to either approve or disapprove of EWC's final RFI and CMS reports, and require EWC to revise the reports if disapproved by the Region. EWC contends that the Region should only be allowed to disapprove of the reports if they are inconsistent with the previously approved RFI and CMS work plans. In response, the Region contends that the work plans cannot serve as substitutes for the final reports, and that the authority to disapprove the final reports is an important element of developing an effective corrective action program. The Region correctly notes that disapproval of a final report is not solely dependent on failure to follow the RFI or CMS work plan. A decision to approve or disapprove requires an evaluation of the sufficiency and accuracy of the data generated and analysis presented. Data and analysis from RFI and CMS work plans should generally, but may not always, be sufficient.

EWC has offered no legal or policy reason why the Region's authority should be limited in the manner EWC suggests. Moreover, we believe that the dispute resolution procedure outlined above will afford ample opportunity for EWC to challenge the basis for any disapproval of a final report by the Region, and present any argument as to why the report should be approved. Accordingly, review on the basis of this issue is denied.

M. *Toxicity Characteristic Conditions*

Condition IV of the permit imposes requirements on EWC for the handling of Toxicity Characteristic (TC) wastes, and states that EWC must use the Toxicity Characteristic Leaching Procedure (TCLP) or knowledge of the waste to determine whether the waste exhibits the characteristic of toxicity. The condition also provides that "[u]se of the TCLP does not exempt the Permittee from also using the Extraction Procedure (EP) toxicity test if required by the State permit conditions." Permit at 18. With respect to this condition, EWC contends only that the Region erred by failing "to specify which provisions of the State license are incorporated into the permit." Petition at 35. However, EWC offers no specific legal or policy arguments as to why the Region's reference to the State permit is deficient, or how EWC might be prejudiced by the condition as drafted. In this circumstance, we conclude that EWC's objection is too vague to be sustained, and we accordingly deny review on the basis of this issue. *See In re Adcom Wire*, RCRA Appeal No. 92-2, at 10 (EAB, Sept. 3, 1992) (Permittee must provide argument as to why condition at issue warrants review.); *LCP Chemicals*, RCRA Appeal No. 92-25, at 5 (same).

N. *Determination of No Further Action/Permit Modification*

EWC objects to Condition III.F.2., which requires EWC to submit a "Class 3" permit modification request in order to terminate the schedule of compliance if it is determined that corrective action is not required. Further, EWC contends that the permit should specify "the constituent levels which result in an irrefutable conclusion that no adverse impact is occurring for all media for which the Permit requires corrective action." Petition at 34. We will address EWC's argument concerning the absence of "action levels" in the permit first.

In its response to comments on the draft permit, the Region justified its refusal to include action levels in the permit by stating that:

> Specific cleanup levels for different hazardous constituents in each medium will not be established. The U.S. EPA believes that different cleanup levels will be appropriate in different situations for each media and that the levels are best established as part of the remedy selection process.

Response to Comments at 21.

The Region's decision not to incorporate action levels in the permit before EWC is required to perform the RFI is inconsistent with the views articulated by the Agency in its Subpart S proposed regulations, and with past precedent of the Board. In *Sandoz Pharmaceuticals*, we addressed a similar objection to a Region's failure to establish action levels when a HSWA permit is first issued. We stated that:

> On July 27, 1990, the Agency proposed a comprehensive set of regulations for the implementation of RCRA § 3004(u), the Subpart S proposal. *See* 55 Fed. Reg. 30,798 (July 27, 1990). The Subpart S proposal constitutes the Agency's most recent, comprehensive statement of its views regarding corrective action under RCRA § 3004(u). The preamble to the Subpart S proposal makes clear that action levels should be specified when the permit is first issued. For example, at one point in the preamble, the Agency states:
>
> > Action levels will, whenever possible, be incorporated in the permit. The Agency believes it is advantageous to identify action levels in the permit so that the public and the permittee will know in advance what

> levels will trigger the requirement to conduct a CMS. This approach also minimizes the need for permit modifications later in the process, which could delay ultimate cleanup.

55 Fed. Reg. at 30,814. In another passage, the preamble contains the following statement:

> Requirements for the remedial investigation would be specified by the Agency in a schedule of compliance in the facility's permit. The schedule would typically identify the SWMUs and environmental media that required more detailed investigation as well as the types of investigations required; it would also typically require the owner/operator to develop a plan for conducting these investigations. The permit would also include "action levels" for specific constituents in specific media under investigation. If subsequent investigation indicated that these action levels had been exceeded, a Corrective Measure Study could be required by the Agency.

Id. at 30,810.

> It is certainly conceivable that, in certain cases for site-specific reasons, a Region will be justified in deviating from this approach, but Region II has not offered any site-specific reasons for such a deviation here. On remand, the Region should explain why a deviation from the approach delineated in the Subpart S proposal is appropriate in this case. Alternatively, if the Region determines that the permit should be revised to include action levels, it should adjust the permit accordingly.

Sandoz Pharmaceuticals, at 9-10. For the reasons explained in *Sandoz*, EWC's permit is hereby remanded to the Region for evaluation of whether any site-specific reasons justify deviation from the Subpart S proposal, and inclusion of action levels in EWC's permit unless a deviation can be justified as appropriate.

If the Region includes specific action levels in the permit, then the Region's evaluation of the RFI and determination of whether the action

levels have been exceeded for particular media will determine whether EWC must prepare a CMS. If the Region concludes that action levels have not been exceeded, then the requirement to prepare a CMS will not be triggered and the schedule of compliance will automatically lapse with respect to the particular SWMU involved. It will therefore be unnecessary for EWC to request a permit modification to terminate the schedule of compliance. If the Region concludes for site-specific reasons that it is not appropriate to set specific action levels in the permit, then we agree with the Region that a Class 3 permit modification under 40 C.F.R. § 270.42(c) will afford the appropriate means for evaluating whether further corrective action requirements should be deleted from the schedule of compliance because EWC's RFI disclosed no contamination or contamination levels that indicate that further corrective action may be unnecessary.

O. *Air Emissions Conditions*

Permit Condition V. imposes air emissions standards on EWC, including requirements of 40 C.F.R. Part 264, Subparts AA and BB, relating to standards for process vents and equipment leaks, and recordkeeping and reporting requirements of Part 264. Condition V.E. states further that "[t]he Permittee shall comply with all self-implementing provisions of any future air regulations promulgated under the provisions of Section 3004(n) of RCRA, as amended by HSWA." Permit at 18. It is only this last condition with which EWC takes exception on appeal.

EWC contends that 40 C.F.R. § 270.4 (the RCRA "permit shield" provision) sets forth the only circumstances under which new regulations become applicable without a permit modification, and that the as yet unpromulgated regulations which the Region attempts to incorporate through Condition V.E. are not included in § 270.4. In response, the Region states that "EWC omits to mention new air emission requirements that become effective by statute are also regulations applying to permitted facilities." Response to Petition at 27-28. The Region argues that because RCRA § 3004(n) requires the Agency to promulgate air emission standards for permitted facilities, and the first phase of those regulations has been promulgated under 40 C.F.R. Part 264 Subparts AA and BB, permit modification is not required where "additional hazardous waste units will be subject to further phases of the air emission regulations." *Id.* at 28.

We do not believe the Region's position is legally sound. Under the regulations governing the effect of a RCRA permit:

> (a) Compliance with a RCRA permit during its term constitutes compliance, for the purposes of enforcement, with

> subtitle C of RCRA *except for those requirements not included in the permit which*:
>
> (1) Become effective by statute;
>
> (2) Are promulgated under part 268 of this chapter [the LDR restrictions];
>
> (3) Are promulgated under part 264 of this chapter regarding leak detection systems for new and replacement surface impoundment, waste pile, and landfill units, and lateral expansions of surface impoundment, waste pile, and landfill units. The leak detection system requirements * * * will be implemented through * * * Class 1 permit modifications.

40 C.F.R. § 270.4 (emphasis added). There is no contention that the future air emissions standards at issue in permit condition V.E. fall within the ambit of 40 C.F.R. § 270.4(a)(2) or (3). With respect to § 270.4(a)(1), it is true that RCRA § 3004(n) requires the Agency to promulgate air emission standards for hazardous waste treatment, storage, or disposal facilities. However, the statute itself does not set forth specific air emissions requirements which become effective without further Agency action. We therefore cannot agree that RCRA § 3004(n) provides authority for the inclusion of Condition V.E. in the permit. Accordingly, the permit is remanded and the Region is directed on remand to delete Condition V.E. from EWC's permit or identify appropriate statutory or regulatory authority for its inclusion.

P. *Schedule of Compliance*

Finally, EWC objects to the timetables for various activities imposed in the permit's Schedule of Compliance. EWC requests generally that the timetables be extended for each of the investigations and studies required under the permit in order to "ensure that [expert] consultants are available and quality work is produced." Petition at 37-38. EWC does not point to any specific circumstances that will prevent it from meeting its obligations under the existing Schedule of Compliance. The Region contends that the Schedule of Compliance was substantially modified in response to EWC's comments on the draft permit, and that the timeframes established in the Schedule are consistent with those imposed under similar circumstances.

Where a petitioner has failed to offer concrete support or justification for a claim that a Schedule of Compliance is unreasonable, we have deferred to the Region's judgment in setting the schedule and denied review. *See Brush Wellman Inc.*, RCRA Appeal No. 92-17, at 5-6 (EAB, Aug. 25, 1992); *Beazer East*, RCRA Appeal No. 91-25, at 8 (speculative concerns regarding ability to comply with schedule do not merit review). In this case, EWC offers only unsubstantiated assertions that the timeframes will cause the work required under the permit to be of poor quality. If circumstances arise which hamper EWC's efforts, EWC is free to seek a permit modification with respect to a particular deadline. The Region has already demonstrated its willingness to try to accommodate EWC's needs by modifying the Schedule of Compliance in response to EWC's comments. Under these circumstances, we deny review of this issue. *See Sandoz Pharmaceuticals*, RCRA Appeal No. 91-14, at 12-13; *Brush Wellman, Inc.*, RCRA Appeal No. 92-17, at 5-6 (EAB, Aug. 25, 1992).

III. *CONCLUSION*

For the reasons explained herein, the following permit provisions are remanded to Region V and the Region is directed to reopen the permit proceedings for further action consistent with this opinion: Condition I.G. (Waste Minimization); Condition III. (Dispute Resolution Provision); Condition III.C.1. (Identification of North Tank Farm as SWMU); Condition III.F.2. (Determination of No Further Action/ Permit Modification); and Condition V. (Air Emissions Conditions).[12] Appeal of the remand decision will not be required to exhaust administrative remedies under 40 C.F.R. § 124.19. In all other respects, EWC's Petition for Review is denied.

So ordered.

[12] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *See, e.g., GSX*, at 20.