IN RE DELCO ELECTRONICS CORPORATION

RCRA Appeal No. 93-10

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided September 28, 1994

Syllabus

Delco Electronics Corporation (Delco) seeks review of a final permit decision issued to it by U.S. EPA Region V under the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.* In its petition for review, Delco raises objections concerning: (1) a permit provision that would require Delco to report to Region V "all available information" concerning "any" future release of hazardous waste or hazardous constituents from solid waste management units at the permitted facility, within thirty days after Delco's discovery of the release; (2) permit provisions that establish an administrative process for resolving any future disputes over the scope of the investigation required to be performed at the facility; and (3) a permit provision identifying criteria that Region V intends to consider when choosing remedial measures to be implemented at the facility, if any such measures are found necessary.

Held: (1) The permit's reporting requirement for newly discovered hazardous waste releases from solid waste management units is upheld. The permit condition at issue simply carries forward, for the duration of the permit, a reporting obligation that the Agency's RCRA regulations already impose at the permit-application stage for all hazardous waste releases that are identified as of that time. The Agency's authority to collect information on hazardous waste releases from solid waste management units, both from applicants for HSWA permits and from HSWA permittees, necessarily follows from its statutory responsibility (under RCRA § 3004(u)) to ensure that appropriate corrective measures are taken in response to such releases. The Region is directed, however, to clarify the applicability of the reporting requirement for future releases to a particular type of allegedly routine air emission from one of the solid waste management units at the Delco facility.

(2) The permit is remanded to Region V for inclusion of the dispute resolution procedures proposed by the Region in its response to the petition for review:

> (a) Delco's objection to the assignment of the Region's Associate Director, Waste Management Division, Office of RCRA (the same official who issued the final permit decision under review) as the "final decisionmaker" in the dispute resolution process is rejected; provided, however, that if an initial decision to disapprove or modify one of Delco's investigative work plans or reports is actually made or issued by the Regional Administrator, rather than by the Associate Division Director, then the Regional Administrator must be available to act as the final Agency decisionmaker if that action is challenged by Delco.

(b) Delco's contention that the proposed permit language does not clearly provide an opportunity to make an oral presentation to the Regional permitting staff responsible for a disputed revision is well founded. Review of this issue is denied, however, because the Region has provided the necessary assurances in its response to the petition for review, thereby mooting the issue.

(c) Delco's objections concerning the timing of various aspects of the proposed dispute resolution process do not identify any clear error of fact or law or any important policy matter or exercise of discretion, and are therefore rejected as grounds for review.

(3) The permit is also remanded for revision of the provision that lists, in summary fashion, certain of the criteria that the Region will employ when selecting any necessary remedial measures to be implemented at this facility. The provision does not accurately incorporate the approach to remedy selection set forth in a proposed Agency rule dealing with the subject (proposed 40 C.F.R. § 264.525, 55 Fed. Reg. 30,797, 30,877 (1990)), although the Region acknowledges that the "relative cost" of alternative remedies should be considered in a manner consistent with the proposed rule. The provision is therefore remanded for revision in a manner consistent with the proposed rule and the discussion herein.

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

Opinion of the Board by Judge McCallum:

I. *BACKGROUND*

Delco Electronics Corporation (Delco) appeals from a June 30, 1993 permit decision issued by U.S. EPA Region V pursuant to the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq.* The HSWA permit sets forth initial corrective action requirements for five solid waste management units (SWMUs) at Delco's Kokomo, Indiana manufacturing plant, a 173-acre facility producing electronic components for the automotive industry.[1]

In its petition for review, Delco objects to the provisions of the HSWA permit that: (1) require Delco to inform Region V of any future releases of hazardous waste or constituents from solid waste management units at the Kokomo facility within thirty days after discovery; (2) describe a procedure for addressing future disputes over the extent of the investigative work required to be performed at the facility; and (3) describe how the Region, after Delco's investigative work is completed,

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

will choose from among alternative remedial approaches in the event that a cleanup is necessary.[2]

At the Environmental Appeals Board's request, Region V filed a response to the petition for review on November 1, 1993. In addition, with leave of the Board, Delco filed a reply brief in support of its petition on November 30, 1993, and the Region submitted a response to the reply brief on December 30, 1993.[3] Finding no clear error of fact or law reflected in the Region's permit decision, we will deny the petition for review but will remand certain portions of the permit for revision in accordance with commitments made by the Region in its briefs on appeal. Our reasons follow.

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 the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level." *Id.* The petitioner bears the burden of demonstrating that review is warranted. *See, e.g., In re Environmental Waste Control, Inc.*, RCRA Appeal No. 92-39, at 3-4 (EAB, May 13, 1994); *In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 4 (EAB, Nov. 23, 1993).

[2] Two other concerns raised in the petition, pertaining to (a) the extent of Delco's obligation under Permit section I.D.10 to provide notice of planned "physical alterations or additions" to the Kokomo facility, and (b) the effect of an attachment to the permit entitled "Corrective Action Scope of Work," have been fully accommodated by the Region in its response to the petition. No dispute remains with respect to either of those permit provisions. *See* Response to Petition at 10 (Permit § I.D.10 will be revised such that "notice of planned changes to the facility will be required only for those activities 'necessary to achieve compliance' with HSWA"); *id.* at 17 (the permit's "Scope of Work" attachment is meant to serve as "a model for the development of site-specific RFI and CMS workplans"). Accordingly, Permit condition I.D.10 will be remanded for incorporation of the revised language proposed by Region V. Delco's request for review concerning the effect of the "Scope of Work" attachment is denied as moot.

[3] On January 10, 1994, Delco submitted a third brief in support of its petition, together with a motion for leave to file the additional brief. In its motion, Delco stated that its third brief sought only to address the effect of the Board's decision in *In re Amoco Oil Company*, RCRA Appeal No. 92-21 (EAB, Nov. 23, 1993), which was issued shortly before the completion of Delco's November 30 reply brief and was therefore not discussed in that earlier brief. Region V objected to the submission of Delco's January 10 brief and, in response, filed a "motion to strike" in which it asked the Board to disregard the contents of the January 10 brief. Delco's motion for leave to submit the January 10, 1994 supplemental brief is hereby granted, and the Region's motion to strike is denied.

A. *Newly Discovered Releases*

Section III.D of the HSWA permit imposes two reporting obligations, one of which Delco finds objectionable. First, section III.D requires Delco to provide certain basic information (*e.g.*, location, dates of operation, wastes managed) concerning "any new SWMU identified at the facility." Next, it requires Delco to:

> [S]ubmit to the Regional Administrator, *within thirty days of discovery*, all available information pertaining to any release of hazardous waste(s) or hazardous constituent(s) from any new or existing SWMU.

Permit § III.D.2, at 15 (emphasis in original). The information to be reported concerns releases that have not yet occurred (or have not yet been discovered) as of the date of permit issuance, but that occur (or are discovered) during the life of the HSWA permit. If notified of such a release, "[t]he Regional Administrator will review the information provided * * * and may, as necessary, require further investigations or corrective measures." Permit § III.E.

In its petition for review, Delco argues that a reporting requirement applicable to "any" future hazardous waste release is "beyond the Region's regulatory authority" under RCRA § 3004(u); according to Delco, the requirement must, as a matter of law, apply only to releases of such magnitude (measured in terms of quantity or concentration) that notice to the Region is "necessary to protect human health and the environment." Petition for Review, at 11. Delco argues in the alternative that the reporting requirement, even if authorized by section 3004(u), is nonetheless "arbitrary and capricious" because it might require Delco to report "insignificant" releases along with those that are significant. *Id.* at 11-12.[4] We conclude, however, that the permit reasonably calls for the Region, rather than Delco, to determine whether future releases at Delco's plant threaten human health or the environ-

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[4] In the introductory sentence of its argument, Delco also characterizes the reporting requirement as "overbroad." Petition for Review, at 11 ("[Delco] requests that the EAB grant review of Condition III.D.2 of [the] permit because it is overbroad."). We do not construe Delco's passing mention of overbreadth as a separate objection to the reporting requirement, but rather as a shorthand reference to the objection that, because the reporting requirement might capture some "insignificant" information, the requirement is beyond EPA's statutory authority and/or is "arbitrary and capricious." To the extent that Delco's reference to overbreadth is intended as a free-standing objection meaning something other than that, it is too general and conclusory for the Board to evaluate in any meaningful way, and must therefore be rejected. *See, e.g., In re Environmental Waste Control, Inc.*, RCRA Appeal No. 92-39, at 6 (EAB, May 13, 1994) (describing petitioner's obligation to explain its objections and to provide supporting argumentation); *In re LCP Chemicals - New York*, RCRA Appeal No. 92-25, at 4-5 (EAB, May 5, 1993) (same).

ment or are otherwise "significant" from the standpoint of the corrective action process.

The Agency's statutory authority to require reporting of future releases is not limited in the manner suggested by Delco. Acting under the authority conferred by RCRA § 3004(u), EPA has already promulgated a regulation requiring applicants for RCRA permits to submit, with Part B of the permit application, "all available information pertaining to any release of hazardous wastes or hazardous constituents" from each solid waste management unit at the applicant's facility. 40 C.F.R. § 270.14(d). That information, together with the additional information obtained through a RCRA Facility Assessment, provides the basis for determining whether and to what extent corrective measures are needed to protect human health and the environment. *See* 40 C.F.R. § 264.101. There is no statutory basis for concluding that the same procedure, relying on precisely the same reporting, is impermissible as applied to releases identified after the issuance of a permit.[5] To the contrary, the Administrator has previously upheld a reporting requirement for future releases from SWMUs as a valid exercise of Agency authority under RCRA § 3004(u), finding it "entirely reasonable" to require permittees to furnish the same type of information that 40 C.F.R. § 270.14(d) already elicits from them at the permit-application stage. *In re Owen Electric Steel Co.*, RCRA Appeal No. 89-37, at 5-7 (Adm'r, Feb. 28, 1992). Here, too, we hold that the challenged reporting requirement for hazardous waste releases from SWMUs is well within the legal authority conferred by RCRA § 3004(u), and that the requirement is not arbitrary and capricious.[6]

[5] Indeed, the preamble to the final rule enacting 40 C.F.R. § 270.14(d) states that "[i]n cases where releases from a SWMU are not identified at the time of permit issuance, the owner/operator has a continuing responsibility to report and address such releases * * * ." Preamble to the Codification Rule for the 1984 Amendments, 52 Fed. Reg. 45,787, 45,789 (Dec. 1, 1987). The preamble further states that "[t]he legislative history of section 3004(u) demonstrates that Congress intended to extend the requirements of section 3004(u) to releases that occur after permit issuance * * * ." *Id.* (citing S. Rep. No. 284, 98th Cong., 1st Sess. 32 (1983)).

[6] Certain obligations in corrective action permits do require, before the obligation is triggered, a prior determination that a threat to human health or the environment may exist. For example, 40 C.F.R. § 264.101 indicates that releases must be cleaned up only "as necessary to protect human health and the environment." Likewise, an obligation to notify the surrounding community of a release that has migrated beyond the boundaries of a RCRA facility requires, consistent with the language of RCRA § 3004(v), a prior finding that the release threatens human health or the environment. *See In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 15-17 (EAB, July 29, 1993). But it would make no sense to require such a finding to justify the reporting condition at issue in this case. Without access to available information about hazardous waste releases from SWMUs, the Region could not determine whether a threat exists and could not fulfill its responsibility to respond to the threat.

Delco also argues in its petition that, to reduce its reporting burden, Delco "should be excused from reporting ***known releases at existing SWMUs.***" Petition for Review, at 11 (emphasis added). In other words, Delco believes that certain future releases should be exempt from the reporting requirement not on the basis of their quantity or "significance," but because the Region already knows they will occur and further notice is, therefore, futile.[7] The Region responds that for "existing SWMUs"—*i.e.*, units already identified as SWMUs as of the date of issuance of the permit—Delco need only report any "previously unreported releases of hazardous wastes or constituents." Response to Petition for Review, at 14. But Delco claims that even under that formulation, it might have to report future hazardous waste releases that, although "previously unreported" by Delco, are nonetheless "of a nature and kind that the Region already has considered in designating an area as a SWMU and that Region V already has determined either do or do not warrant further investigation." Petitioner's Reply Brief, at 8.

Fortunately, this concern arises only in relation to a single SWMU at Delco's facility, and is otherwise strictly hypothetical. SWMU No. 12 consists of two tanks from which spent solvents have previously been released to the soil and ground water. Delco does not appear to object to reporting future releases to the soil or ground water from SWMU No. 12, if any should occur. Delco, however, does not want to report air emissions from the "process vents" with which the two tanks are equipped, because those are "ongoing releases" of which Region V is already aware, and because air emissions from process vents are subject to a distinct set of regulatory requirements under RCRA (*see* 40 C.F.R. Part 264, Subpart AA).

We agree that the extent of Delco's reporting obligation with respect to the process vent air emissions from SWMU No. 12 is not entirely clear, although it appears that the Region intends for those emissions to be governed by the reporting requirements at 40 C.F.R. Part 264, Subpart AA (as incorporated into the permit by reference at Permit § V.A). *See* Response to Petition for Review, at 14 n.1. We therefore direct Region V to provide further notice to Delco, on remand, clarifying whether or not the process vent air emissions are subject to

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[7] Ordinarily, we would conclude that Delco waived any such objection by failing to raise the objection in its comments on the draft permit. *See, e.g., In re General Motors Corporation, Inland Fisher Guide Division*, RCRA Appeal No. 93-5, at 11 n.13 (EAB, July 11, 1994). Here, however, the Region acknowledges that the new objection identifies an ambiguity in the relevant permit language, and the Region has articulated a specific curative interpretation rather than interposing a waiver argument. We choose to defer to the Region's apparent conclusion that Delco's objection should, in the interest of clarity, be addressed at this time notwithstanding its untimeliness.

the requirements of Permit section III.D.2. That clarification should be issued within forty-five days after the date of service of this order. In all other respects, review of the reporting requirement at Permit § III.D.2 is denied.

B. *Dispute Resolution*

Delco raises several objections concerning the permit's mechanism for resolving future disputes over the scope of investigation required at the Kokomo facility. Initially, in commenting on the draft permit, Delco urged that the dispute resolution provisions, when finalized, should conform to and incorporate the decision of the Environmental Appeals Board with respect to such provisions in the (then-pending) permit appeal *In re General Electric Company*, RCRA Appeal No. 91-7.[8] A decision in *General Electric* was issued two months after Delco submitted its comments and now, in its petition for review, Delco challenges the dispute resolution provisions in its own permit by identifying several specific aspects of the dispute resolution procedure that are, in Delco's view, inconsistent with the Board's analysis in *General Electric*. In response, Region V proposes to revise the dispute resolution language in Delco's permit to address some of the alleged deficiencies identified in the petition for review, but Delco continues to object to various aspects of the dispute resolution provisions as proposed to be revised.[9]

The dispute resolution procedure proposed by Region V includes the following steps:

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[8] Delco's comments proposed, in the alternative, a dispute resolution process involving administrative hearings conducted in accordance with 40 C.F.R. Part 24, to be followed by judicial review.

[9] In addition, Delco objects to the Region's action in proposing revised permit language on appeal, and asks that we order the Region to present the proposed revisions in the form of a draft permit subject to a new comment period and a new opportunity for appeal to the Board. Petitioner's Reply Brief, at 3 ("Delco must be given an opportunity to make sufficient comment and, if necessary, to appeal the Region's new proposals."). We conclude that such procedures are not required.

Region V could reasonably have chosen, after *General Electric* was decided, to reopen the comment period applicable to Delco's permit rather than proceeding to issue a final permit. But the record does not indicate that any such request was made of the Region. In any event, the decision whether to reopen a public comment period is ordinarily discretionary, *see* 40 C.F.R. § 124.14(b); *In re GSX Services of South Carolina, Inc.*, RCRA Appeal No. 89-22, at 19 (EAB, Dec. 29, 1992), and the Region did not abuse its discretion by declining to do so in this case. The Region believed, correctly, that *General Electric* validated the general approach to dispute resolution reflected in Delco's draft permit (*see* Response to Comments on the Draft Federal Permit, at 18), and the Region acted to correct specific inconsistencies as soon as they were brought to its attention in Delco's petition for review.

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(1) EPA will furnish Delco with written notice setting forth the reasons for any decision to disapprove (or modify) any of Delco's investigative work plans or reports; if Delco disagrees with the decision, it must so notify EPA's permit writer and must participate with the permit writer in attempting "informally and in good faith" to resolve the dispute.

(2) Delco must also submit a written statement of its objections, both to the permit writer and to the EPA official responsible for issuing the permit—Region V's Associate Director, Waste Management Division, Office of RCRA. Delco must submit this document within twenty-eight days after receiving EPA's original notice of disapproval or modification. This submission commences the "formal" dispute resolution process with which Delco's appeal is primarily concerned, and which was the principal focus of the Board's discussion in *General Electric.*

(3) During the fourteen days (or more, if there is "good cause" for an extension) following submission of Delco's statement, Delco and the EPA permit writer will "meet or confer to attempt to resolve the dispute." If those attempts are unsuccessful, Delco may then submit (within an unspecified period) "additional arguments and evidence, not previously submitted," for consideration by

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Delco has also had an adequate opportunity for appeal. The appellate record before us includes several forceful statements of Delco's views regarding dispute resolution. *See* Comments on the Federal Portion of the Draft RCRA Permit, Comment No. 29, at pp. 6-7 (Feb. 14, 1993); Petition for Review, at 2-9 (July 28, 1993); Petitioner's Reply Brief, at 3-5 (Nov. 30, 1993); Petitioner's Response to Region V's Reply Brief, at 1-3 (Jan. 10, 1994). Delco's position is clearly set forth in the existing record, and we do not believe that additional comment-and-response proceedings at the Regional level — culminating in a future appeal raising the same issues that Delco has already raised — would materially assist the Board in its analysis of the questions presented. Moreover, according to 40 C.F.R. § 124.19(f)(1)(iii), even if the challenged revisions to the dispute resolution clause were to be re-proposed on remand as Delco suggests, another opportunity to appeal those revisions to the Board would not necessarily follow.

> the Associate Division Director. The Associate Division Director will then issue a written decision resolving the dispute, based on the documentary record as supplemented by Delco following its meeting with the permit writer.

Delco's first objection to the dispute resolution mechanism relates to the identity and impartiality of the Agency official who will function as the "final decisionmaker." In *General Electric* we held that, "[f]or policy reasons, * * * the final decisionmaker for the Agency should be the person with authority to issue the final permit decision itself." *In re General Electric Company*, RCRA Appeal No. 91-7, at 24 (EAB, April 13, 1993). That approach, we reasoned, would ensure "that decisions on disputes over revisions to interim submissions [are] treated [as having] the same importance as decisions pertaining to the original permit." *Id.* Delco's permit is consistent with that reasoning because the Associate Director of the Region's Waste Management Division—who is the issuer of Delco's original permit under authority delegated by the Regional Administrator—will serve as the final decisionmaker in the event that a dispute is not resolved, formally or informally, to Delco's satisfaction by the EPA permit writer.

Delco is concerned, however, over the Associate Division Director's ability to function impartially, because certain language in the permit can be read to suggest that the entire dispute resolution process is triggered by a decision initially made by the Regional Administrator. *See* Permit §§ III.F.1.a ("The Regional Administrator will approve, modify and approve, or disapprove * * * the [RCRA Facility Investigation] Workplan"); III.F.1.c ("the Regional Administrator shall either approve or disapprove the [RFI] Report in writing"); III.F.3.a (same, for the Corrective Measures Study work plan); III.F.3.c (same, for the Corrective Measures Study report). The Associate Division Director is, of course, subordinate to the Regional Administrator, and Delco objects to a procedure that would place the Associate Division Director in the position of reexamining a decision originally made by his or her boss.

Delco's concern, then, is in a sense the very opposite of that which we addressed in *General Electric.* There the permittee was primarily concerned that a supervisory EPA official—the Regional Waste Management Division Director—could not impartially review a decision initially reached by his or her subordinates on the RCRA permitting staff, because of the allegedly "close relationship" between the Director and the staff. *General Electric*, RCRA Appeal No. 91-7, at 18. We concluded, however, that there was little genuine risk that the

Division Director's relationship with the permitting staff would actually compromise the Director's objectivity if the Director were called upon to reexamine a recommendation made by the staff. *Id.* at 22-24. Here the analysis is quite different: If the Associate Division Director were called upon to reexamine a decision that has actually been considered and endorsed by the Regional Administrator, the risk of unfairness impresses us as far more substantial. Accordingly, without deciding whether the concern raised by Delco is of constitutional magnitude, we agree that it would not be permissible for a subordinate EPA Regional official to act as the final decisionmaker in a dispute over a proposed revision of an interim submission, if the disputed action has already received the endorsement of that official's superior.

We do not believe, however, that such a scenario is what Delco's permit actually contemplates. The Regional Administrator will surely not routinely become involved in making initial determinations concerning the adequacy of the investigative plans and reports prepared by Delco; indeed, it is clear from a common sense reading of the permit that the Regional Administrator will not (as, according to *General Electric,* he need not) become involved in such evaluations at any stage. When the permit mentions the "Regional Administrator" functioning in that role, we are satisfied that the term refers to the Associate Division Director acting, just as in the initial issuance of this permit, under authority delegated by the Regional Administrator.[10]

That being so, we conclude that the dispute resolution provisions proposed by Region V offer no less protection against erroneous Agency determinations than the provisions approved in our prior cases. Our cases uniformly hold that due process is satisfied by providing a permittee with the opportunity to (among other things) "submit comments to, and meet with, the regional permitting staff responsible for making any disputed revisions," and then to "submit written arguments and evidence to the person in the Region with the authority to make the final permit decision." *In re Amoco Oil Company,* RCRA Appeal No. 92-21, at 6 (EAB, Nov. 23, 1993). *See also In re Allied-Signal, Inc. (Frankford Plant),* RCRA Appeal No. 90-27, at 7 (EAB, July 29, 1993); *In re Environmental Waste Control, Inc.,* RCRA Appeal No. 92-39, at 15 (May 13, 1994). Those are precisely the procedural safeguards that

[10] *See* 40 C.F.R. § 264.10 (in the regulations establishing the RCRA permit program, "Regional Administrator" means the official who holds that position "or his designee"). We emphasize, however, that if an initial decision to disapprove or modify one of Delco's submissions actually does emanate from the Regional Administrator rather than his or her designee—if, for instance, notice of the Region's action is issued to Delco over the signature of the Regional Administrator—then the Regional Administrator must be available to act as the final Agency decisionmaker in the event that Delco challenges that particular decision through the dispute resolution procedures described in its permit.

Delco's permit provides. We therefore deny the petition for review insofar as it challenges the assignment of the Associate Division Director as the final decisionmaker in the dispute resolution process.

Delco next objects that the permit does not guarantee Delco an opportunity to meet with the member or members of the Regional permitting staff responsible for the initial decision to disapprove an interim submission. The permit language in question states:

> The Permit Writer and the Permittee shall have an additional 14 days from the Associate Division Director's receipt of the Permittee's statement of position to meet or confer to attempt to resolve the dispute. This time period may be extended by U.S. EPA for good cause shown.

We agree with Delco that this language is ambiguous, and does not clearly recognize—as it should—that Delco is entitled to request a meeting with the permit writer and that the Region must honor that request. The ambiguity, however, is cured by the Region's explanation, in its response to the petition for review, that the permit language will be interpreted as "offer[ing] the Permittee an opportunity to * * * meet with the Permit Writer regarding the dispute." Response to Petition for Review, at 6. We regard that interpretation as binding upon the Region, and we conclude that it adequately addresses Delco's concern over the possible denial of a future request for a meeting. We therefore deny the petition for review insofar as it challenges the permit's failure to guarantee a meeting, upon request, between Delco and the permit writer in the course of a dispute over an interim submission.[11]

Finally, Delco objects to the timing of certain aspects of the dispute resolution process. Delco argues that: (1) the unspecified "informal" dispute resolution efforts in which Delco must participate should be concluded before Delco is required to begin preparing its "formal" written statement for submission to the permit writer and the Associate Division Director; (2) Delco should be allowed to meet with the permit writer "significantly before Delco must submit its statement of position and supporting documentation to the [permit writer and Associate Division Director]," so that Delco can then "respond in its submissions to information learned or positions taken at the meeting;" and (3) all

[11] Delco also contends that the permit makes inadequate provision for informing the Associate Division Director—with whom Delco will not have an opportunity to meet—of any "progress" made at its meeting with the permit writer. Petitioner's Reply Brief, at 4. But the permit expressly allows Delco to submit, for inclusion in the record to be examined by the Associate Division Director, any "additional written arguments and evidence" developed or located after the date of Delco's initial written statement. Delco can use that opportunity, if it so chooses, to apprise the Associate Division Director of any progress that has been made toward resolving the dispute.

deadlines should be automatically extended in the event of difficulty in scheduling a meeting, because "[t]he Region must not be allowed to frustrate the purpose of the meeting requirement because its schedule is full." Petitioner's Reply Brief, at 4-5.

None of those objections raises any issue of sufficient magnitude to warrant review. We are confident that Delco is capable of preparing a written statement of its position within twenty-eight days after a dispute arises, even if Delco's representatives are also engaged, meanwhile, in "good faith efforts" to resolve the dispute on an informal basis. And there is no basis for suggesting that Delco will be unable to supplement its written arguments after meeting with the permit writer; to the contrary, as we have already observed (*see supra* note 11), the permit expressly allows Delco to do just that. We also reject Delco's apparent assumption that, in the absence of an explicit admonition to the contrary by this Board, the Region will seek to ignore the merits of a dispute "because its schedule is full." Accordingly, we deny the petition for review with respect to the timing and sequence of the various dispute resolution procedures in revised section III.G of Delco's permit.[12]

C. *Remedy Selection*

Delco objects to Permit section III.F.4 ("Corrective Measures Implementation"), which identifies criteria on which the Region's selection of corrective measures for this facility will be based, if any such measures are determined to be needed. The permit states:

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[12] We also reject three other objections to the proposed dispute resolution mechanism as unfounded. First, Delco claims that the entire framework for dispute resolution was introduced into its permit after the close of the comment period. Petition for Review, at 2 n.1. In reality, however, dispute resolution provisions were included in the draft permit (Petition for Review, Exh. A, at 18-19) and Delco did in fact comment on those provisions (*Id.* Exh. B, at 6-7). *See also supra* note 9. Second, Delco argues that the permit should include a separate provision stating that disputes involving "substantial financial stakes" might call for enhanced procedural protections. Petition for Review, at 9. We concluded in *General Electric*, however, that it would be left to the Regions to identify, "on a case by case basis," those exceptional disputes for which additional procedural safeguards might be warranted. *General Electric*, RCRA Appeal No. 91-7, at 21-22. We did not suggest, nor do we accept Delco's suggestion, that corrective action permits must specifically recite that the applicable requirements of procedural due process could vary according to the magnitude of a disputed revision. Finally, we reject Delco's contention that Region V retains too much discretion to determine which portions of an interim submission are and are not stayed pending resolution of a dispute. Petition for Review, at 9. The permit reasonably requires compliance with portions of the submission and of the permit that the Region concludes are not "substantially affected" by the dispute. Delco does not propose an alternative standard, and the Region correctly notes that this is just the kind of determination that the Regions routinely make whenever a permit appeal is filed with this Board under the procedures in Part 124. *See* 40 C.F.R. § 124.16(a)(2) ("Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. Stayed conditions of permits * * * shall be identified by the Regional Administrator.").

> Based on the results of the [Corrective Measures Study], the Regional Administrator shall select one or more of the Corrective Measures in the CMS, and shall notify the Permittee in writing of the decision. The Regional Administrator's selection will be based on performance, reliability, implementability, safety, and human health and environmental impact of the measure or measures.

Delco argues that the permit should expressly refer to "cost" as a factor to be considered in the selection of corrective measures. That contention is based on a proposed EPA regulation stating that, when the Agency chooses among alternative remedies that satisfy four threshold environmental criteria, it will look to five additional "remedy selection factors"—one of which is cost. *See* proposed 40 C.F.R. § 264.525, 55 Fed. Reg. 30,797, 30,877 (July 27, 1990).

We agree that an unexplained deviation from the approach to remedy selection outlined in a proposed Agency rule would be unacceptable. *See, e.g., In re Chevron Chemical Co.*, RCRA Appeal No. 90-15, at 5 (EAB, April 27, 1992) (departure from Agency guidance and proposed rules requires a "reasoned justification"); *In re Sandoz Pharmaceuticals Corp.*, RCRA Appeal No. 91-14, at 10 (EAB, July 9, 1992) (departure from Subpart S proposal must be justified on the basis of "site-specific reasons"). The Region makes clear, however, in its briefs on appeal, that no inconsistency between Delco's permit and proposed 40 C.F.R. § 264.525 was intended. We will therefore remand Permit § III.F.4 for revision in accordance with the following discussion, in order to eliminate the apparent inconsistency identified by Delco.

According to the proposed rule, a remedy can be considered for implementation only if it meets four minimum standards:

> Remedies must: (1) Be protective of human health and the environment; (2) Attain media cleanup standards * * * [13]; (3) Control the source(s) of releases so as to reduce or eliminate * * * further releases * * *; and (4) Comply with standards for management of wastes as specified in * * * this subpart.

[13] "Media cleanup standards" are the hazardous constituent concentration levels (in the soil, surface water, ground water, and/or air) that the corrective action process at a particular facility seeks to achieve. *See* proposed §§ 264.525(d)-(e).

Proposed 40 C.F.R. § 264.525(a). If, but only if, two or more of the remedies studied have been found to meet those standards, do the "remedy selection factors" cited by Delco become relevant. They are:

(1) A remedy's long-term reliability and effectiveness;

(2) The degree to which the remedy will reduce the toxicity, mobility, or volume of hazardous wastes and constituents;

(3) The remedy's short-term effectiveness, and the short-term risks that it might pose;

(4) The remedy's "implementability"; and

(5) Costs (*e.g.*, capital costs and operation and maintenance costs) associated with the remedy.

See proposed 40 C.F.R. § 264.525(b).

Delco's permit makes no real attempt to describe a two-step analysis like that in the proposed rule. Instead, the permit merely summarizes the remedy selection process in a single sentence that mentions only one of the proposed rule's four minimum standards (*i.e.*, protection of human health and the environment) but not the other three, and likewise mentions only two of the proposed rule's five "remedy selection factors" (*i.e.*, reliability and implementability) but not the other three. If, therefore, the Region intends to adhere to the analytical framework in the proposed rule—as it insists that it does—then Permit section III.F.4 cannot be regarded as a definitive statement of the remedy selection process that the Region will follow. The Region concedes as much, and has committed itself to the position in this case that, "consistent with the Proposed Rule," it will consider relative cost as a selection factor when it chooses from among alternative remedies that "meet[] the clean-up levels required by U.S. EPA" and that are "equally protective" of human health and the environment. Response to Petition for Review, at 11-12.

The Region's position is consistent with the proposed rule in recognizing that a remedy must be found capable of achieving appropriate cleanup levels and of protecting human health and the environment—and, we would add, of satisfying the other two minimum standards in proposed section 264.525(a)—before the Region may con-

sider the remedy's cost in relation to the costs of other remedies that also meet the minimum standards. As explained in the preamble to the proposed rule:

> [I]n many cases several different technical alternatives to remediation will offer equivalent protection of human health and the environment, but may vary widely in cost. The Agency believes that it is appropriate in these situations to allow cost to be one of the several factors influencing the decision for selecting among such alternatives.

55 Fed. Reg. at 30,825. Relative cost thus becomes a permissible selection factor under the proposed rule only when the Agency confronts a choice among alternative remedies that have been determined, *inter alia*, to "offer equivalent protection of human health and the environment."[14] Accordingly, the Region is directed to revise the language in section III.F.4 on remand, to reflect that Delco's permit does allow for consideration of relative cost in choosing among remedies that offer an equivalent level of protection, and that satisfy the other minimum standards described in proposed 40 C.F.R. § 264.525(a).

III. *CONCLUSION*

The permit is remanded to Region V for revision of sections I.D.10 ("Reporting Planned Changes"), III.F.4 ("Corrective Measures Implementation"), and III.G ("Dispute Resolution") in a manner consistent with the discussion herein.[15] In addition, Region V is directed to notify Delco in writing, within forty-five days after the date of service of this order, concerning the applicability of Permit section III.D.2 to future air emissions from the "process vents" at Solid Waste Management Unit No. 12. No appeal of the Region's actions on remand will be required to exhaust administrative remedies under 40 C.F.R. § 124.19. In all other respects, Delco's petition for review is denied.

So ordered.

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[14] It does not follow, however, that (as the Region suggests in its response to Delco's petition) a general category of "technically-related factors * * *, such as performance, reliability, and safety" must also be evaluated before any consideration of cost becomes permissible. Response to Petition for Review, at 11-12. The proposed rule contemplates that at least one of the "technically-related factors" cited by the Region—reliability—becomes relevant, as does cost, only during the second stage of the remedy selection analysis.

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