IN THE MATTER OF BEAZER EAST, INC., AND KOPPERS INDUSTRIES, INC.

RCRA Appeal No. 91–25

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided March 18, 1993

Syllabus

Koppers Industries, Inc. and Beazer East, Inc. (Beazer) petition for review of the federal portion of a permit issued by Region IV under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act. The petition seeks review of a permit for Beazer's wood treatment facility in Guthrie, Kentucky. Beazer asks that review be granted with respect to whether: (1) permit condition I.A. is inconsistent with the language of 40 C.F.R. §270.4(a) (1991); (2) the permit's use of the term "hazardous constituent" rather than "hazardous waste constituent" is arbitrary and capricious; (3) the characterization of the RCRA Facility Investigation (RFI) Workplan Outline and the Corrective Measure Study Plan Outline as "requirements" rather than "guidelines" is improper; (4) the 30-day period for submitting the final RFI report is unreasonably short; (5) many of the permit's corrective action requirements are duplicative and unnecessary in light of prior and ongoing remediation; (6) the permit improperly requires further investigation of various solid waste management units or areas of concern; and (7) the permit's abbreviated procedure for Agency-initiated modifications to the schedule of compliance improperly deprives Beazer of the right to an administrative appeal.

Held: The permit is remanded and the Region is directed to remove the abbreviated modification procedure (Appendix E) from the permit and revise Permit Condition II.I.2. to specify that Agency-initiated modifications to the schedule of compliance must proceed in accordance with 40 C.F.R. §270.41. Review is denied with regard to all other issues.

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

Opinion of the Board by Judge McCallum:

I. *BACKGROUND*

Koppers Industries, Inc. (the owner) and Beazer East, Inc. (the operator) (hereinafter referred to collectively as "Beazer")[1] have filed a petition seeking review of the federal portion of a permit issued by U.S. Environmental Protection Agency Region IV (the "Region") under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.A. §§ 6901–6992k, for Beazer's wood treatment facility in Guthrie, Kentucky.[2] As requested by the Agency's Judicial Officer,[3] the Region filed a response to Beazer's petition for review.

Since approximately 1913, the facility has produced treated wood products using a pressurized creosote process. The primary wastes of concern from Beazer's operations contain creosote and constituents released from the degradation of creosote. These wastes originate from, among other things, the drippage of freshly treated wood and from process wastewater from which K001 sludge is generated.[4] According to a 1987 Interim RCRA Facility Assessment Report (dated June 9, 1987), releases of creosote contaminated waste have occurred and may have migrated off-site. The final HSWA permit determination (dated September 30, 1991) requires, among other things, investigation of releases at several of the facility's solid waste management units (SWMUs) or areas of concern and requires Beazer to comply with all land disposal restrictions applicable to the facility. In appealing the permit determination, Beazer argues that: (1) Permit Condition I.A. contains language inconsistent with the language of 40 C.F.R. § 270.4(a) (1991); (2) the term "hazardous constituents" in Permit Condition I.D.14. should be replaced by "hazardous waste constituents;" (3) the characterization of the RCRA Facility Investigation

[1] Both parties are listed on the final permit.

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

[3] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

[4] K001 waste is a specific-source waste listed under 40 C.F.R. § 261.32 as "[b]ottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol."

(RFI) Workplan Outline and the Corrective Measure Study (CMS) Plan Outline (Appendix B and C to the final HSWA permit) as requirements rather than guidelines is arbitrary and capricious; (4) the 30-day period for submitting the Final RFI Report in Permit Condition II.E.3.b. is unreasonably short; (5) many of the permit's corrective action requirements are duplicative and unnecessary in light of ongoing investigations and remediation efforts required by the State; (6) the permit improperly requires investigation of certain SWMUs and areas of concern; and (7) the permit's abbreviated procedure for Agency-initiated modifications to the schedule of compliance (Permit Condition II.I.2. & Appendix E) is contrary to the regulations and constitutes an abuse of discretion.

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 section 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the Petitioner. *See Pollution Control Industries of Indiana, Inc.*, RCRA Appeal No. 92–3, at 3 (EAB, August 5, 1992); *Sandoz Pharmaceuticals Corp.*, RCRA Appeal No. 91–14, at 3 (EAB, July 9, 1992).

1. *Permit Condition I.A.*

Permit Condition I.A. of the draft HSWA permit stated in pertinent part as follows:

> Compliance with this RCRA permit constitutes compliance, for purposes of enforcement with Subtitle C of RCRA, except for those requirements not included in the permit which become effective by statute, which are promulgated, or those which restrict placement of hazardous wastes in or on the land.

In its comments on the draft permit, Beazer argued that this language did not accurately reflect the language of 40 C.F.R. § 270.4. Comments on Draft Permit at 1 (Exh. A to Petition for Review). 40 C.F.R. § 270.4(a) (1991) provides:

> Compliance with an [sic] RCRA permit during its term constitutes compliance for purposes of enforcement, with Subtitle C of RCRA except for those requirements not included in the permit which become effective by statute, or which are promulgated under part 268 of this chapter restricting the placement of hazardous wastes in or on the land.

In its Petition for Review Beazer argued that "[t]he Permit should be modified to ensure that Condition I.A. is consistent with 40 C.F.R. § 270.4 and the existing caselaw [sic] * * *." Petition for Review at 2. As the Region stated in its Response, however, the permit has already been revised to accurately reflect the language of § 270.4.[5] Region's Response at 3. This issue is therefore moot.

2. *Release of Hazardous Constituents*

> Permit Condition I.D.14.a. provides:
>
> The Permittees shall report any noncompliance which may endanger human health or the environment. Any such information shall be reported orally to the RA within 24 hours from the time the Permittees become aware of the circumstances. This report shall include:
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> i. Information concerning the release of any hazardous waste or hazardous constituent which may endanger public drinking water supplies.
>
> ii. Information concerning the release or discharge of any hazardous waste or hazardous constituents, or of a fire or explosion at the facility, which could threaten the environment or human health outside the facility.

Beazer argues that use of the term "hazardous constituents" in the above-quoted provision creates confusion regarding its reporting obligations and should be replaced by "hazardous waste constituents." According to Beazer, the latter term is employed in the permit to define its monitoring responsibilities, and is narrower in scope than

[5] Due to an administrative error, the revised condition was not included in the final HSWA permit originally sent to Beazer. This error has been corrected and the modified condition has been incorporated into the final permit contained in the record on appeal.

"hazardous constituents." Therefore, without the change, Beazer believes it would be required to report releases of constituents that it is not required to monitor. Petition for Review at 3.

The principal problem we have with this argument is that Beazer does not provide any citations to the permit or the record to support its belief that there is a permit term obligating it to monitor "hazardous waste constituents," as opposed to monitoring "hazardous constituents." Our own examination of the permit fails to disclose any use of the term "hazardous waste constituents," but it does disclose numerous instances where the permit employs the term "hazardous constituents."[6] In addition, we fail to see how use of the latter term is in any way objectionable. It is clear that the Agency has the authority under section 3004(u) of RCRA to regulate releases of hazardous constituents from any solid waste management unit at Beazer's facility. In interpreting section 3004(u), which authorizes the Agency to regulate "all releases of hazardous waste or constituents from any solid waste management unit," the Agency has relied upon the legislative history of RCRA in arriving at the determination that these so-called "hazardous constituents" should be defined by reference to Appendix VIII of 40 CFR Part 261.[7]

> The term "hazardous constituent" as used in this section is intended to mean those constituents listed in Appendix VIII to 40 CFR Part 261 [H.R. Rep.

[6] In addition to obligating Beazer to comply with the various terms and conditions explicitly set forth in the permit, the permit also states that Beazer must comply with various regulations, specifically, 40 CFR Parts 260 through 264, 266, 268, 270, and 124. We have not combed every single word in these regulations to discover whether the term "hazardous waste constituents" is ever used, but we do note that one of the principal provisions governing monitoring uses the term "hazardous constituents." *See* 40 CFR §264.97 ("General ground-water monitoring requirements"). Although not mentioned in the permit, the Agency's proposed "Subpart S" regulations, which represent the Agency's most recent, comprehensive statement on corrective action under RCRA Section 3004(u), *see In re General Electric Company,* RCRA Appeal No. 91–7, at 17, n. 9 (EAB, November 6, 1992), similarly appears to employ the "hazardous constituent" terminology, rather than the term "hazardous waste constituents." *See* 55 Fed. Reg. 30,798 *et seq.* (July 27, 1990).

[7] Appendix VIII, which is denominated "Hazardous Constituents," consists of a list of substances that have been shown "to have toxic, carcinogenic, mutagenic or teratogenic effects on humans or other life forms." 40 C.F.R. §261.11(a)(3). Appendix VIII was first published on May 19, 1980, prior to the enactment of section 3004(u) of RCRA in 1984. *See* 45 Fed. Reg. 33066, 33132–33 (May 19, 1980). At that time, Appendix VIII served as one of several criteria used by the Agency to identify and list hazardous wastes. *Id.* at 33121 (codified at 40 CFR §261.11(a)(3)). Appendix VIII currently serves that same function, *see* 40 CFR §261.11(a)(3) (1992), as well the additional function of defining hazardous constituents for purposes of section 3004(u) of RCRA.

> No. 198, 98th Cong., 1st Sess., part 1, 60–61(1983)] and includes hazardous constituents released from solid waste and hazardous constituents that are reaction byproducts. S. Rep. No. 98–284, 98th Cong., 1st Sess. 32 (1983).

50 Fed. Reg. 28713 (July 15, 1985) (brackets in original); *see also* RCRA § 3004(u), 42 U.S.C. § 6924(u); 40 C.F.R. § 264.101; *In re Owen Electric Steel Company of South Carolina,* RCRA Appeal No. 89–37, at 6–7 (Adm'r, Feb. 28, 1992) (upholding the Region's legal authority to require a permittee to report releases of hazardous constituents from SWMUs). As used in the permit, the term "hazardous constituents" has a discrete meaning: it is defined as "substances" listed in Appendix VIII to 40 C.F.R. Part 261. *See* Permit Condition I.G.2. The Agency has previously upheld a corrective action permit's monitoring provision that required monitoring of Appendix VIII hazardous constituents. *In re Hoechst Celanese Corporation,* RCRA Appeal No. 87–13 (Adm'r, Feb. 28, 1989). Beazer has not explained how an obligation to report releases of these substances would result in it being required to report releases of constituents not falling within the lawful scope of its monitoring responsibilities under the permit. Nor has Beazer shown that the permit is defective in any respect for employing the term "hazardous constituents." It is a defined term in both the permit and the regulations. We therefore reject Beazer's contention that the term "hazardous constituents" in the reporting provisions of the permit should be modified in any respect. Accordingly, the Region has not overstepped its bounds. Review of this issue is denied.

3. *RFI and CMS Minimum Requirements*

Beazer objects to Permit Conditions II.E.1.c. and II.G.1.b., which require, *inter alia,* that the RFI Workplan and the CMS Plan meet the requirements of permit Appendices B (RCRA RFI Workplan Outline) and C (CMS Plan Outline) respectively. Specifically, Beazer contends that these documents are intended as guidelines for preparing RFI and CMS workplans and "should not be given inflated importance by referring to them as 'requirements'." Apparently, Beazer is concerned that by referring to these provisions as "requirements," the Region will apply them in an overly rigid manner without adequate regard for site-specific considerations. *See* Comments on Draft Permit at 4 (Exh. A to Petition for Review) (stating that the term "requirements" "appears to be too rigid").

We agree that corrective action requirements must not be so rigid as to ignore site-specific conditions at a facility. *See In re General Motors Corporation,* RCRA Consolidated Appeal Nos. 90–24, 90–25, at 10 (EAB, November 6, 1992) ("[T]o the extent practicable[,] corrective action requirements must be tailored to site-specific conditions at the facility."). In the present case, however, the Region points out that the permit allows Beazer to deviate from the corrective action requirements in appropriate circumstances. That is, although the disputed permit conditions refer to Appendices B and C as "requirements," both conditions provide that the Regional Administrator may allow omissions or deviations where the permittee provides sufficient written justification. Thus, the permit allows both the RFI Workplan and CMS plan to be tailored to the facility based on site-specific considerations. Beazer's concerns regarding the rigidity of the disputed permit conditions are therefore exaggerated and do not warrant further review.[8]

4. *Final RFI Report Deadline*

Beazer objects to that portion of Permit Condition II.E.3.b. which requires Beazer to submit to the Regional Administrator (RA) a final RFI report within 30 days of receiving the RA's comments on the draft RFI report. Beazer contends that because the extent of the RA's comments on the draft report are unknown, the possibility exists that 30 days may not provide enough time to submit the final report.

[8] Beazer also states in its petition for review that "[b]ecause EPA is asserting that these two guidelines represent minimum requirements for the RFI and CMS workplans respectively and because no statutory or regulatory authority exists supporting this assertion, these conditions of the Permit are arbitrary, and capricious and represent an abuse of discretion." Petition for Review at 4. This objection, however, is so conclusory as to preclude meaningful review. That is, Beazer fails to explain exactly why it believes the disputed permit provisions exceed the Region's statutory or regulatory authority and we find nothing in the record on appeal that sheds additional light on the substance of its argument. In Beazer's comments on the draft permit, Beazer stated:

> [Permit Condition II.E.1.c] refers to the "requirements" and "minimum requirements" of Appendix B. This language appears to be too rigid. It is our understanding that Appendix B parallels a model document which was originally intended to address most potential situations encountered during a RFI. As such, we agree with the use of Appendix B as a guideline, and are in agreement with the stipulation that deviations or omissions should be justified and approved. This same comment applies to the requirements of the CMS Plan, * * *.

Comments on Draft Permit at 4. Thus, Beazer concedes that this condition is appropriate at least where the permit allows deviations in appropriate circumstances. That is the case here. Beazer's request for review on this basis is also denied.

Beazer does not point to any evidence in the record, however, to suggest that Beazer will be unable to meet the 30-day deadline. Beazer's concerns are thus purely speculative. Review is therefore denied.[9] *See In re Hytek Finishes Co.,* RCRA Appeal No. 88–45, at 2 (Adm'r, January 13, 1989) (Agency administrative appeal procedure should not be used to pursue speculative concerns).

5. *Duplicative Corrective Action Requirements*

Beazer contends that the permit's corrective action requirements improperly duplicate similar requirements imposed by the State of Kentucky pursuant to an Agreed Order (dated June 25, 1987)[10] signed by the Koppers Company and the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet (Cabinet), and a Corrective Action Order (dated March 15, 1991)[11] issued by the Cabinet. According to Beazer, the permit requires the permittee "to duplicate work that has already been done under the State's purview, especially with regard to the submission of RFI workplans and Confirmatory Sampling workplans for units that have already been fully characterized." Petition for Review at 5. Beazer also argues that the Region has failed to coordinate the permit's corrective action requirements with efforts already undertaken in cooperation with the State.

As the Board stated in *General Motors, supra,* where a permittee has already initiated remediation efforts, corrective action requirements should reflect sufficient site-specificity to avoid imposing duplicative and unnecessary requirements on the permittee. *Id.* at 8. In *General Motors,* Region V had imposed corrective action requirements even though the permittee was already engaged in ongoing remediation efforts with the approval of State and local officials. We denied review, however, because the Region had agreed to consider all data generated by the permittee through prior investigations and to allow the use of these data (where appropriate) to satisfy the permit's

[9] Region IV has stated that Beazer may request a modification of the permit should it become clear that additional time will be required. Region's Response to Comments on the Draft Permit at 7 (Exh. C to Region IV's Response). Because the Region is presumably aware that the amount of time required for it to process certain types of modification requests may exceed 30 days, we assume that the Region will not seek to penalize Beazer for a late submission of the final RFI report if it has previously made a timely and good faith modification request seeking an extension of time to file the final report.

[10] Exh. E to Region IV's Response.

[11] Exh. F to Region IV's Response.

corrective action requirements. *Id.* at 9. Thus, any unnecessary duplication would be avoided.

Similarly, in the present case, the Region has stated that Beazer may:

> rely on and incorporate into the RFI Workplan or Confirmatory Sampling Workplan any investigations or other work performed to date. * * * Based on the information submitted with the workplans, the Agency may determine that a deletion of a unit from either of the workplans is warranted, or the Agency may limit the scope of work required under the workplans. The Agency will then require implementation of the RFI/Confirmatory Sampling in accordance with the approved workplans. In this way, *the Agency will take full advantage of the Permittees' prior efforts.*

Region's Response at 6 (emphasis added). The Region also states that, in accordance with a Memorandum of Agreement with the Kentucky Department of Environmental Protection, it will work closely with the Department to coordinate the State program with the federal HSWA program and to minimize duplication of work at the site. *Id.* Given the Region's willingness to take advantage of Beazer's prior efforts and to consider the data generated to date in determining whether Beazer has satisfied the permit's corrective action requirements, we see no reason to grant review. *See General Motors, supra,* at 9.

6. *Sampling and Investigation Requirements*

Beazer objects to the requirement that it conduct an RFI or perform confirmatory sampling at several of the facility's SWMUs and areas of concern (AOCs). Specifically, Beazer contends that an RFI is unnecessary at the following areas: the tram draw out track, the drip track area, the collection sump, the swampy area, the North and South land farm areas, the oil and lubricant storage building, the product storage areas, and the old lagoon and surface impoundment areas. As to the confirmatory sampling requirement, Beazer contends that there are several areas where it is unnecessary: the surge tank area, the surge tank collection sump and preheat tank, the basement sump, the primary separator, and the storage tank area.

With regard to most of these areas[12] Beazer argues that the work conducted and the data gathered to date render the RFI or confirmatory sampling requirements duplicative and therefore unnecessary. As the Region has stated, however, any information obtained from prior or ongoing remediation at these areas may be incorporated into the RFI or submitted for review with the Confirmatory Sampling Workplan. *See* Region's Response at 7–10 (noting that the permittee should submit for review any information obtained through prior studies or removal activities in order to minimize duplication of work); Region's Response to Comments on the Draft Permit at 9 (Exh. C to Region IV's Response) ("[A]ny information gained from earlier studies * * * can and should be submitted for review as *part* of the HSWA required RFI or Confirmatory Sampling Workplans.") (emphasis in original). The Region will therefore consider Beazer's prior remediation efforts and determine whether they are sufficient to satisfy the permit's corrective action requirements. The Region has also indicated that, to the extent possible, it will coordinate the federal corrective action requirements with those of the State. *See* Region's Response to Comments at 8. We therefore reject Beazer's assertion that the HSWA permit will require unnecessary duplication of effort. *See General Motors, supra,* at 9 (denying review based on the Region's willingness to consider data gathered from prior remediation).

The remaining areas consist of the product storage area, the basement sump, and the storage tank area. As to the product storage area, Beazer objects to the requirement that it perform an RFI because this site "is not a source of constituents contributing to the general environmental condition at the Guthrie facility * * *." Petition for Review at 8. Beazer provides no support for this assertion. Moreover, the record on appeal indicates that stained soil was observed in several locations surrounding the product storage area during the visual site inspection (VSI). *See* Interim RCRA Facility Assessment Report at III–6, C–10 (Exh. H to Region IV's Response). Based on such observations, the Facility Assessment Report concludes that there is a high potential for a release of creosote in the product storage area. *Id.* at III–6. Given these findings (which Beazer does not dispute), we reject Beazer's assertion that the permit improperly requires that an RFI be performed at this site.

[12] The areas include the tram draw out track, the drip track area, the collection sump, the swampy area, the north and south land farm areas, the oil and lubricant storage building, the surge tank area, the surge tank collection sump and preheat tank, the primary separator, and the old lagoon and old surface impoundment areas.

As to the basement sump area, Beazer objects to the permit requirement that confirmatory sampling be performed there because this area has already been extensively cleaned and is maintained in a "dry" state. As stated above, however, the Region has agreed to consider any information obtained from prior remediation efforts. Thus, if Beazer's remediation efforts have been as extensive as it alleges, its future obligations should not be substantial. In addition, as the Region states in its Response, whether or not the basement sump area is currently maintained in a "dry" state is irrelevant to whether contamination remains from past releases. Region's Response at 10. We therefore find nothing unreasonable in the permit's confirmatory sampling requirement for this area.[13]

Finally, the storage tank area is also subject to a confirmatory sampling requirement to which Beazer objects. Beazer contends that the tank has been out of service for many years and is scheduled to be cleaned out. Beazer also states that "[t]here are no plans to use the tank for future storage of wood treating chemicals." Petition for Review at 10. As the Facility Assessment Report indicates, however, this area consists of an above ground tank used to store creosote, and "[s]tained soil was observed around the tank during the VSI."[14] Facility Assessment Report, *supra,* at C–4. The Region therefore determined that confirmatory sampling was required in order to assess the extent of any releases into the surrounding soil (if any). Beazer has failed to convince us that there is anything unreasonable about this determination.

7. *Administrative Review of Permit Modifications*

Permit Condition II.I.2. bars administrative appeals from modifications to the corrective action schedule of compliance that are initiated by the Regional Administrator.[15] Beazer contends that the

[13] We note that according to the Facility Assessment Report, Beazer's duty to conduct soil sampling and analysis at the basement sump does not arise unless there is a negative report on the structural integrity of the unit itself. *See* Facility Assessment Report at III–3 (Exh. H to Region IV's Response). Moreover, although the permit includes this unit on a list of SWMUs requiring confirmatory sampling, the permit only requires that integrity testing be performed. *See* Permit Appendix A.3. (Exh. A to Region IV's Response).

[14] Beazer does not dispute this finding.

[15] This provision provides:

> Modifications [to the corrective action schedule of compliance] that are initiated and finalized by the Regional Administrator according to proper procedure, as outlined in appendix E, shall not be subject to administrative appeal.

Region lacks the authority to include such a provision.[16] For the following reasons, we agree that the Region lacks the regulatory authority to include this abbreviated procedure in the permit.

In *General Motors, supra,* the Board addressed an objection to a virtually identical permit modification provision. In that case, as here, the abbreviated permit modification procedure allowed the Regional Administrator to modify the schedule of compliance without providing an opportunity for administrative appeal. *Id.* at 15–16. As the Board stated in that case:

> [T]he permit's abbreviated modification procedure represents a change in existing regulatory require-

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Appendix E (Modification of the Corrective Action Schedule of Compliance) provides, in part:

> I. If at any time the Regional Administrator determines that modifications of the Corrective Action Schedule of Compliance is necessary, he or she may initiate a modification to the Schedule of Compliance according to this procedure. If the Regional Administrator initiates a modification, he or she shall:
>
> A. Notify the Permittee in writing of the proposed modification and the date by which comments on the proposed modification must be received; and
>
> B. Publish a notice of the proposed modification in a locally distributed newspaper, mail a notice to all persons on the facility mailing list * * * and place a notice in the facility's information repository* * *.
>
> 1. If the Regional Administrator receives no written comment on the proposed modification, the modification shall become effective five (5) calendar days after the close of the comment period.
>
> 2. If the Regional Administrator receives written comment on the proposed modification, the Regional Administrator shall make a final determination concerning the modification after the end of the comment period.
>
> C. Notify the Permittee in writing of the final decision.
>
> 1. If no written comment was received, the Regional Administrator shall notify individuals on the facility mailing list in writing that the modification has become effective* * *.
>
> 2. If written comment was received, the Regional Administrator shall provide notice of the final modification decision in a locally distributed newspaper* * *.
>
> II. Modifications that are initiated and finalized by the Regional Administrator according to this procedure shall not be subject to administrative appeal.

[16] Beazer argues that the Region lacks both the statutory and regulatory authority to bar administrative appeals from Agency-initiated modifications to the schedule of compliance. Because we conclude that the Region lacks the regulatory authority to include this permit provision, we do not reach the question of whether the Region also lacks statutory authority.

> ments set forth in 40 C.F.R. § 270.41. Because this procedure has not been adopted by regulation, the Region must remove [it] from the permit * * *.

General Motors, supra, at 17. We find no substantive difference between the abbreviated modification procedure in *General Motors* and the one in the present case. Accordingly, the permit is remanded and the Region is directed to remove Appendix E from the permit and revise Permit Condition II.I.2. to specify that Agency-initiated modifications to the schedule of compliance must proceed in accordance with 40 C.F.R. § 270.41.[17] *Id.*

III. *CONCLUSION*

The permit is remanded and the Region is directed to reopen the permit proceedings for the limited purpose mentioned above.[18] Appeal of the remand decision will not be required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii). On the other

[17] The Region incorrectly relies on the following language in *In re United Technologies Corporation Pratt & Whitney Group,* RCRA Appeal No. 88–34, at 3–4 (Adm'r, Feb. 12, 1990), to support the inclusion of the abbreviated modification procedure:

> [T]he permit properly gives to the Region final authority to make various interim decisions during the corrective action process, with the ultimate corrective measures to be added to the permit through a major modification (which will afford Petitioner an opportunity for administrative review at that time). * * * Allowing an administrative appeal from such interim decisions and approvals would lead to unnecessary and undesirable delays in the corrective action process. If petitioner is dissatisfied with an interim decision by the Region, it is free to pursue any available opportunities for judicial review.

United Technologies upholds the Region's authority to make certain "interim decisions and approvals" during the corrective action process. When read in context, the reference to the non-appealability of "such interim decisions and approvals" properly refers to interim decisions that do not constitute permit modifications for the purpose of 40 C.F.R. § 270.41. In the present case, the disputed permit provisions explicitly allow the Region to revise the permit's existing schedule of compliance without complying with 40 C.F.R. § 270.41. Such revisions are clearly permit modifications, not "interim decisions and approvals," and must therefore be adopted through existing regulatory procedures. The Region's reliance on *United Technologies* is therefore misplaced.

[18] 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 GSX Services of South Carolina, Inc.,* RCRA Appeal No. 89–22, at 20 (EAB, December 29, 1992).

issues raised by Beazer, review is denied for the reasons set forth above.[19]

So ordered.[20]

[19] In its Petition for Review, Beazer also objected to certain language in Permit Condition II.D.1. and to the listing of the treatment cylinders, heated storage tanks, and the dehydrator as areas of concern. These issues have subsequently been resolved by the parties and are not addressed in this Order. *See* Letter from Monica Gambino to Suzanne Gale Rubini, Assistant Regional Counsel (December 12, 1991) (Exh. D to Region IV's Response).

[20] Beazer has requested that the Board stay the disputed permit provisions pending judicial review. Because we find no basis upon which to issue such a stay, however, Beazer's request is denied.