IN THE MATTER OF GENERAL MOTORS CORPORATION, DELCO MORAINE DIVISION, ET AL.

RCRA Consolidated Appeal Nos. 90–24, 90–25

ORDER DENYING REVIEW IN PART, REMANDING IN PART, AND GRANTING REVIEW IN PART

Decided November 6, 1992

Syllabus

This order consolidates two petitions for review filed by General Motors Corporation (GMC). The petitions seek review of the federal portion of two permits issued by Region V under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act. The first petition seeks review of a permit for GMC's Delco Moraine Division North Plant in Dayton, Ohio (North Plant), and the second for GMC's Delco Moraine Division South Plant, also in Dayton, Ohio (South Plant). The North Plant petition asks that review be granted with respect to: (1) the permit's definition of "solid waste management unit" (SWMU); (2) the allegedly improper designation of SWMUs; (3) the imposition of corrective action requirements at a former chrome plater site; (4) the allegedly overly broad corrective action requirements; (5) the permit's interim measures provision; (6) the permit provisions allowing the Region to modify interim submittals; (7) the Region's authority to modify a permit under RCRA § 3005(c)(3); (8) the permit provision requiring GMC to provide notice of changes in plant operations; (9) the permit's definition of "Hazardous waste"; (10) the permit's potential for allowing the misuse of photographs taken during EPA inspections; (11) the permit's failure to guarantee GMC's right to split samples; and (12) the permit's severability provision. The South Plant petition raises issues 1, 6–8, and 10–12 noted above. In addition, the South Plant petition seeks review of: (1) an alleged inconsistency in the duration of the permit; and (2) the Region's failure to delete a permit provision even through it had agreed to do so.

Held: Both permits are remanded to the Region. With regard to the North permit, the Region is ordered to: (1) modify the permit to correct inconsistencies in the timing for the submission of various reports and the items to be included in those reports and (2) ensure that Agency-initiated modifications to incorporate interim measures comply with the modification procedures at 40 C.F.R. § 270.41. With regard to both the North and South plant permits, the Region is ordered to: (1) remove language from permit condition I.B. allowing the Region to modify the permit "as determined necessary to protect human health and the environment, pursuant to Section 3005(c)(3) of RCRA"; (2) tailor Permit Condition I.D.10, if necessary, to fulfill the Region's HSWA obligations; and (3) add language to the permit guaranteeing GMC's right to split samples. Further, with regard to the South Plant permit, the Region is ordered to delete permit provision I.D.18 which was inadvertently included in the final permit.

The petition for review of the North Plant permit is granted with regard to GMC's contention that the provisions of the permit allowing the Region to revise or require GMC to revise interim submissions prepared during the corrective action process without using the formal permit modification process violates due process. Review is denied with regard to all other issues raised in both petitions.

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

Opinion of the Board by Judge Firestone:

I. *BACKGROUND*

This Order consolidates two petitions for review filed by General Motors Corporation (GMC).[1] Each petition is dated October 29, 1990, and each seeks review of the federal portion of a permit issued by Region V under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resources Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.A. §§ 6901–6992k.[2] The first petition seeks review of a permit for GMC's Delco Moraine Division North Plant in Dayton, Ohio (North Plant), and the second for GMC's Delco Moraine Division South Plant, also in Dayton, Ohio (South Plant). Both permits are dated September 28, 1990.

GMC's North Plant is a manufacturing facility producing disc brake systems, transmission components, and friction materials. The South Plant produces engine parts, brake shoes, and brake shoe linings. Hazardous wastes produced by both Plants are stored in a container storage area prior to their removal off-site.

A RCRA Facility Assessment (RFA) at the North Plant identified a total of 123 Solid Waste Management Units (SWMU's). The only identified release requiring corrective action, however, is located at a former chrome plater site. EPA listed the chrome plater site as "a potential SWMU." Chromium, including haxavalent chromium was detected in the subsoil and ground water beneath this site. GMC has initiated certain remediation efforts in response to these releases in cooperation with State and local officials.

[1] At the time this appeal was filed, 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).

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

There are no known releases of hazardous waste or hazardous constituents from the South facility and no corrective action is required under the permit. Most of the issues raised in GMC's petition for review of the South Plant permit are identical to those raised in its petition for review of the North Plant permit. These include issues 1, 6–8, and 10–12 discussed below. The South Plant Petition also raises two additional issues which are discussed at Part III below.

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 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 thus on the Petitioner. *See In re Pollution Control Industries of Indiana, Inc.,* RCRA Appeal No. 92–3, at 3 (EAB, August 5, 1992); *In re Sandoz Pharmaceuticals Corp.,* RCRA Appeal No. 91–14, at 3 (EAB, July 9, 1992).

1. *Definition of Solid Waste Management Unit (SWMU)*

GMC argues that the definition of a SWMU in both the North and South Plant permits is overly broad and contrary to Congressional intent at the time RCRA § 3004(u) was enacted.[3] We disagree. The North Plant permit defines a SWMU as:[4]

> [A]ny discernable 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.

[3] RCRA § 3004(u) provides that permits issued after November 8, 1984, shall require:

> [C]orrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit.

[4] Contrary to GMC's assertions, the South Plant permit does not define a SWMU.

Permit Condition III.B. Although neither the statute nor the regulations expressly define "SWMU", the terms "solid waste management" and "unit" are defined. "Solid Waste Management" is defined as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." RCRA § 1004(28), 42 U.S.C. § 6903(28). The term "unit" refers to any contiguous area of land on or in which waste is placed. *See* 47 Fed. Reg. 32,289 (July 26, 1982). Based upon these definitions, "the term 'SWMU' plainly includes any unit (contiguous area of land on which waste is placed) used for solid waste management (the systematic collection, source separation, storage transportation, transfer, processing, treatment or disposal of solid waste)." *In re Morton International, Inc. (Moss Point, Mississippi),* RCRA Appeal No. 90–17 at 4 (Feb. 28, 1992). In addition, the legislative history of section 3004(u) indicates that the term "SWMU" embraces any unit in which solid waste management actually occurred regardless of whether such management was intended. *See* H.R. Rep. No. 198, 98th Cong., 1st Sess. Part 1, 60 (1983) (Under RCRA § 3004(u), the Agency should examine all units "from which hazardous constituents might migrate irrespective of whether the units were intended for the management of solid and/or hazardous wastes."); 50 Fed. Reg. 28,712 (July 15, 1985). GMC's arguments to the contrary notwithstanding, the permit's definition of a SWMU is consistent with both the statutory definition of "solid waste management" and the legislative history concerning units intended for regulation under RCRA § 3004(u).[5]

The legislative history of RCRA § 3004(u) states that "[t]he term 'unit' is intended to be defined as in the preamble to EPA regulations published on July 26, 1982, and as further defined in the future." H.R. Rep. No. 198, *supra,* at 60. GMC contends that SWMU's are limited to the types of units specifically listed in the preamble to the Agency's July 26, 1982 regulations referred to in the House Report. These include surface impoundments, waste piles, land treatment units and landfills. *See* 47 Fed. Reg. 32,281 (July 26, 1982). As the Administrator has previously held, however, "nothing in the legislative history permanently confines 'unit' to a fixed list of devices or regulatory categories." *In re Shell Oil Company,* RCRA Appeal No. 88–48 at 5 n.4 (March 12, 1990). In fact, the House report

[5]The permit's definition of "SWMU" also appears consistent with the definition in the proposed Subpart S corrective action proposal. The Subpart S proposal defines "SWMU" as "[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 wastes." 55 Fed. Reg. 30,808 (July 27, 1990). *See also RCRA Facility Assessment Guidance,* OSWER Dir. 9502.00–5 (October 9, 1986) at 1–3.

specifically states that the Agency may further define the term "unit" as necessary to implement the goals of the RCRA program. See H.R. Rep. No. 198, *supra,* at 60. GMC's arguments to the contrary in both the North and South Petitions are therefore rejected.

2. *Application of SWMU Definition*

After conducting a RCRA facility assessment, the Region identified a total of 123 SWMUs at the North Plant facility.[6] GMC contends that even under the permit's definition of a SWMU, many locations have been improperly designated. Specifically, GMC states:

> [M]any of these locations are not discernable units, are items of equipment which have been entirely removed from service, are inactive or were never placed in service, are permitted under the Clean Water Act or the Clean Air Act, or are areas or equipment which do not handle either hazardous wastes or materials containing hazardous constituents, do not handle wastes at all or have no release or potential for release.

Petition for Review at 7. In an attachment to its Petition (Exhibit A), GMC lists the 123 SWMUs and indicates which of above-noted objections applies to each SWMU. None of these specific objections, however, were raised during the public comment period. Review is therefore denied.

In comment number 35 on the draft permit, GMC stated:

> [GMC] does not agree with the designation of SWMUs and areas of concern in Attachment I. We previously questioned inclusion of many of these areas and pieces of equipment. However, we have received no explanation justifying their designation as SWMUs or areas of concern.[7] Therefore, we re-

[6] *See* Permit Attachment I (List of Solid Waste Managements Units (Including Potential Solid Waste Management Units) and Areas of Concern).

[7] GMC is apparently referring to a letter from GMC to Region V dated May 31, 1990 (prior to issuance of the draft permit). In that letter, GMC expressed disagreement with the way SWMU had been defined by EPA for the purposes of the RCRA Facility Assessment. GMC did not object to any specific SWMU designation but argued (as it did in its petition) that "until a legal definition is available, the term SWMU should parallel the traditional hazardous waste management units as identified in the preamble to the 1982 codification regulations."

> serve our right to dispute these designations *if, in the future, EPA proposes specific requirements regarding them.* (emphasis added).

GMC did not contest any specific designation nor did it request any changes to the draft permit. Rather, GMC indicated that it would only dispute the SWMU designations if, at some point in the future, the Region imposed corrective action requirements at any of these locations.[8] These general comments combined with the possibility of future objections fail to satisfy GMC's obligation to provide all reasonably available arguments supporting its position during the comment period. If an issue is reasonably ascertainable during the public comment period, the issue must be raised at that time if it is to be preserved for review. *See* 40 C.F.R. §§ 124.13 & 124.19(a). This requirement ensures that the Region will have an opportunity to address potential problems with a draft permit before the permit becomes final. *See Shell Oil Company, supra,* at 3 ("These rules help to ensure that the Region has an opportunity to address any concerns raised by the permit, thereby promoting the Agency's long-standing policy that most permit issues be resolved at the Regional level."). Because GMC's current objections to the specific SWMU designations were not raised during the comment period, review is denied.

3. *Corrective Action Requirements at the Former Chrome Plater Site*

GMC argues that it was arbitrary and capricious for the Region to impose corrective action requirements[9] at the North Plant's

[8] No such requirements have been imposed. We also note that the Region has agreed to consider future comments by GMC regarding specific units designated as SWMUs. "If GMC presented U.S. EPA with any information indicating that any of U.S. EPA's designations are inappropriate, U.S. EPA remains willing to modify the permit as appropriate." Region's Response at 7, 10.

[9] Generally, corrective action requirements consist of several steps. The first step is usually the RCRA Facility Assessment (RFA), during which the Agency attempts to identify actual and potential releases of hazardous waste or hazardous constituents. The objective of this assessment is to determine if there is sufficient evidence of a release to require the permittee to undertake additional investigation. If the RFA indicates that further investigation is required, the next step is the RCRA Facility Investigation (RFI), during which the permittee assesses the identified releases by characterizing their nature, extent, and rate of migration. The goal of the RFI is to provide sufficient data to determine if remedial action is required. Next, the permittee conducts a Corrective Measure Study (CMS), during which appropriate remedial measures are identified. The Region then selects the appropriate remedial measures which the permittee must implement. See 55 Fed. Reg. 30,801–30,802 (July 27, 1990);

Continued

chrome plater site because GMC is on the verge of completing remedial measures "which have been demonstrated to be extremely effective." Petition for Review at 13. Specifically, GMC contends that, with the approval of State and local officials,

> [it] has identified the source of the contamination and its extent, has implemented measures, which have been entirely successful, to retract the contamination plume, has excavated the most severely impacted soil, has designed a flushing system to deal with remaining contaminated soil and is ready to begin operation of that flushing system.

Petition for Review at 12. Accordingly, GMC argues, additional requirements imposed under HSWA are unnecessary.

Although we agree with GMC that the Region should consider GMC's current remediation efforts and that the permit's corrective action requirements should reflect sufficient site-specificity to avoid imposing unnecessary requirements on the permittee,[10] we conclude that under the facts of this case review is not warranted. In its Response to Comments on the draft permit, the Region stated that "[w]here the U.S. EPA determines that the data generated by previous investigations are adequate to characterize the release, these data may be summarized, and used to satisfy the requirements [of] the Statement of Work. The HSWA permit may then be modified to avoid unnecessary waste of time and resources." Response to Comments at 14. Further, in its response to the petition for review, the Region stated that "GMC may summarize and submit data which are proposed to meet some of the informational requirements of the [Scope of Work] * * *."[11] Region's Response at 21. Thus, if GMC can establish that the work it has performed to date is sufficient to satisfy some or all of the permit's corrective action requirements, the Region must take full advantage of this work to avoid unnecessary duplication and to minimize GMC's paperwork obligations. *See In re Thermal Oxidation Corporation, Inc.*, RCRA Appeal No. 88–28 at 5–6 (Adm'r, July 26, 1990); *In re Hoechst Celanese Corp.*,

Office of Solid Waste and Emergency Response, *National RCRA Corrective Action Strategy*, pp. 9–15 (1986).

[10] *See In re: American Cyanamid Company (Kalamazoo, Michigan)*, RCRA Appeal No. 89–8 at 7 (August 5, 1991).

[11] We also note that the Region has agreed to review a document submitted by GMC entitled *Remediation Plan for the Former South Chromium Plater Site, Delco Marine NDH, Needmore Road Facility, Dayton, Ohio*, for equivalency to the Corrective Measure Study (CMS) requirements. Region's Response at 22.

RCRA Appeal No 87–13 at 4 (Adm'r, February 28, 1989). Given the Region's willingness to consider the data GMC has generated through its prior investigations and to allow GMC to use these data to satisfy the permit's corrective action requirements (if the data are adequate to characterize the release), we see no reason to grant review. We note that if GMC's site investigations and remedial actions to date are as extensive and successful as it alleges, GMC's remaining corrective action responsibilities should not be substantial.

GMC concedes that regardless of whether the chrome plater site is a "SWMU", EPA has the authority to impose corrective action requirements under RCRA § 3005(c)(3) (Petition for Review at 16).[12] GMC nonetheless argues that the permit should be remanded because the Region failed to make a determination that the permit's corrective action conditions are necessary in order to protect human health and the environment as required by § 3005(c)(3).[13] GMC is in error. Permit Condition III.A. states, in part:

> The source of the [chromium] contamination has been identified as a temporary holding tank which was formerly located beneath the plater. This tank was built to contain the chrome plating solution as the plater was emptied for maintenance. The U.S. EPA has determined that a RCRA Facility Investigation is required for the former chrome plater site.
>
> The facility has undertaken some remediation of the soil and ground water as an interim measure. Nonetheless, concerns for the municipal aquifer underlying the facility indicate that *further investigation and corrective action are necessary to protect human health and the environment.*

(Emphasis added). As the foregoing permit provision indicates, the Region has made a determination that the release of a hazardous

[12] GMC argues that the permit improperly designates the chrome plater site as a "potential SWMU." Petition for Review at 10. However, because the Region has agreed that the site is not a SWMU (*see* Region's Response at 11), and because corrective action requirements have been imposed under the authority of RCRA § 3005(c)(3), we see no reason to grant review on this issue.

[13] RCRA § 3005(c)(3) authorizes corrective action for non-SWMU areas when necessary to protect human health and the environment. *See In re: LCP Chemicals-North Carolina, Inc.*, RCRA Appeal No. 90–4, pp. 3–4 (Adm'r, February 14, 1991); *In re: Amarada Hess Corp.*, RCRA Appeal No. 88–10, pp. 3, 5 (Adm'r, August 15, 1989).

constituent (chromium) potentially endangers a drinking water source for the City of Dayton and that corrective action is necessary in order to protect human health and the environment. Nothing in GMC's petition for review or in the record on appeal convinces us that this determination warrants review.

4. *Overly Broad Corrective Action Provisions*

GMC argues that the North Plant permit's Scope of Work Corrective Action Plan (SOW), Permit Attachment II, improperly imposes boilerplate corrective action requirements not tailored to site-specific conditions at the facility. That is, even though the Region has acknowledged that the only area at the facility which requires corrective action is the former chrome plater site, the language of the SOW indicates that it applies to the facility as a whole. Thus, according to GMC, the Region has "illegally transformed the corrective action program and [RCRA] § 3005(c)(3) into an extensive facility-wide requirement not supported by the facts in the record or by a determination of necessity at this facility." Petition for Review at 17.

As noted above, we agree that to the extent practicable corrective action requirements must be tailored to site-specific conditions at the facility. *See In re American Cyanamid Co.,* RCRA Appeal No. 89–9 at 7 (Adm'r, Aug. 5, 1991); *Sandoz Pharmaceuticals, supra,* at 11; *RCRA Corrective Action Plan (Interim Final)* at 1 (June 1988) (OSWER Directive 9902.3) ("Each facility has unique characteristics and circumstances affecting it that need to be incorporated into any requirements for corrective action."). Nonetheless, under the circumstances of this case, we conclude that review or remand are not warranted.

Permit Condition III.A. (Summary of RFA findings), indicates that the only release which warrants corrective action is the former chrome plater site:

> [b]ased on data gathered for the RFA, there is evidence of a release of a hazardous constituent from the former chrome plater site * * *.

The permit does not mention any other releases nor does it indicate that corrective action is required at any location other than the chrome plater site. Indeed, the Region itself (in its response to the petition for review) argues that the permit unequivocally states that corrective action is only required at the chrome plater site. Region's Response at 14. We accept the Region's representation that the per-

mit's corrective action requirements apply only to the chrome plater site and the Agency is hereby bound by this interpretation.[14] This limiting construction of the permit language renders the issue moot.[15] *See In re W.R. Grace & Company,* RCRA Appeal No. 89–28, at 4 n.6 (Adm'r, March 25, 1991).

GMC also argues that several of the specific requirements in the SOW for the North Plant permit are unnecessary or overly broad. Most of these arguments are individually unpersuasive and are discussed briefly below:

(1) GMC contends that much of the information required by the SOW has already been provided in GMC's Part B permit application. As the Region notes, however, the SOW specifically states that any information submitted in the Part B application may be incorporated by reference into any of the reports required by the SOW. *See* SOW at 1; Region's Response at 20. Any duplication of effort will therefore be minimized;

(2) GMC contends that because "of the absence of a SWMU determination and of the existence of prior studies on the chromium release, no need for a RFI workplan has been shown." Petition for Review at 19. As noted above, however, the chrome plater site is not designated as a SWMU in the permit. Rather, the Region has

[14] We note that GMC has conceded that the Region did not intend the requirements of the SOW to apply to the entire facility. *See* Petition for Review at 15.

[15] On September 11, 1992, GMC filed a document entitled *Supplemental Authorities by General Motors Corporation.* GMC has called the Board's attention to two Agency memoranda which it contends support its argument that the Region improperly relied on Agency guidance and ignored site-specific conditions at the facility. These are: 1) a May 27, 1992 memorandum from Don Clay, Assistant Administrator, to Regional Division Directors, regarding "Considerations in Ground-Water Remediation at Superfund Sites and RCRA Facilities—Update;" and 2) a March 27, 1991 memorandum from Lisa K. Friedman, Associate General Counsel, Solid Waste and Emergency Response Division, to Regional Counsel RCRA Branch Chiefs, regarding "Use of Proposed Subpart S Corrective Action Rule as Guidance Pending Promulgation of Final Rule" (hereinafter Friedman Memo). Both documents indicate that although most of the proposed Subpart S corrective action proposal (*see* 55 Fed. Reg. 30,798 *et seq.* (July 27, 1990)) may be used as guidance, any specific permit requirements based on this proposal must be justified on a case-by-case basis. Friedman Memo at 3.

Neither of these submissions affects our determination on this issue. GMC has not presented any evidence that the Region improperly relied on the Subpart S proposal in establishing these requirements nor does the record on appeal contain any such evidence. Moreover, as noted above, the Region has agreed to consider whether GMC's voluntary remediation efforts are equivalent to the HSWA corrective action requirements. Thus, any corrective action requirements will be tailored to site-specific conditions.

determined that corrective action is necessary in order to protect public health and the environment and nothing in GMC's petition convinces us that this determination requires review. Moreover, as noted above, the permit allows GMC to reference any previously provided information;

(3) GMC objects to the requirements that it study and characterize soil parameters and surface waters. As the Region points out, however, available data indicate that these media have been contaminated by the chromium release. The Region determined that such studies are necessary "to ascertain the behavior of the chromium contamination in the soil and groundwater *especially* in light of GMC's proposal to leave chromium contamination in place in the aquifer." Region's Response at 21 (emphasis in original). The record on appeal indicates that this determination was a reasonable one and nothing in GMC's petition convinces us otherwise;

(4) GMC contends that, because of the work it has already done, part II of the SOW (Corrective Measure Study (CMS)), requiring GMC to develop and review remedial alternatives, is unjustified. We disagree. As noted above (*see supra* p.10), the Region has agreed to review GMC's voluntary remediation efforts for equivalence to HSWA to avoid unnecessary duplication. Ultimately, it is the Region's responsibility to determine whether GMC's remediation efforts are consistent with and equivalent to the standards imposed by HSWA. *See National RCRA Corrective Action Strategy,* at p.25 (OSWER 1986). Moreover, the Region has expressed reservations about GMC's intention to leave trivalent chromium in the subsoil under the facility and the possibility of future mobilization of the remaining chromium.

> U.S. EPA is particularly concerned with the evaluation of the remedy's effectiveness, confirmatory testing of the treated soil, risk assessment for the remaining contamination, the proposed total chromium levels to remain in the soil, and contingency plans to be implemented if the residual chromium levels exceed specified target concentrations for the project. U.S. EPA does not feel that these issues have been adequately addressed in GMC's voluntary remediation.

Region's Response at 22. Given the Region's concern for the municipal aquifer underlying the facility, we reject GMC's assertion that the permit's CMS provisions are unjustified;

(5) GMC contends that, upon discovery of any new releases, the permit would require the preparation of a new RFI workplan rather than adding the new release to an existing workplan. According to GMC, this will be "wasteful, duplicative and will delay remediation." Petition for Review at 21. The language of the permit does not support this assertion. Permit Condition III.F. (Notification Requirements for Newly Discovered Releases at SWMUs) states that upon discovery of any release(s), the "Regional Administrator *may* require further investigation" and that "[a] plan for such investigation will be reviewed for approval as part of the RFI workplan." (emphasis added). This provision does not result in the duplication and delay alleged by GMC. As the Region states in its response, the investigation plan:

> will be reviewed by U.S. EPA to determine if the investigation can be made part of the already existing workplan, or if a new workplan is required. A new workplan will be required if incorporation could delay or obstruct the conduct of the already existing workplan.

Region's Response at 23. If, because of the nature of the new release and the media impacted, the Region determines that a new workplan is required, "the Permittee may reference general or specific facility information which was previously gathered in RFIs, the Part B Permit Application, the RFA and other sources." *Id.* at 23–24. Moreover, the Region has indicated that it will "evaluate the previously gathered information for its equivalency to the informational needs of the newly imposed RFI." *Id.* at 24;

(6) GMC contends that the CMS provisions "require adherence to unspecified 'relevant' provisions of other laws, which is not authorized by RCRA or any rule" and that the permit "requires compliance with criteria, standards or guidance that are not rules." Petition for Review at 20–21. In addition, GMC contends that the standards imposed for the Region's approval of corrective measures (in Permit Attachment II.H.) are beyond those in the permit itself and are not justified by RCRA. Because these issues were not raised during the public comment period, review is denied; and

(7) GMC contends that "although the only alleged problem at the [North] plant is groundwater contamination, air must be studied."

Petition for Review at 19. Because this issue was not raised during the public comment period, review is denied.[16]

On the following issue raised by GMC, the permit is remanded to the Region. GMC points out that the North Plant permit's reporting requirements are inconsistent. That is, while Permit section III.D. requires bimonthly progress reports on the status of GMC's corrective action obligations, sections I.E.2. and II.E.2. of Permit Attachment II require monthly reports. In addition, Permit Section III.D. and section I.E. of Attachment II list different items to be included in these reports. In its response, the Region states that the permit will be revised to require bimonthly reporting and that "the list of items to be included in the bimonthly reports will be revised to match the list specified in Condition III.D. of the HSWA permit." Region's Response at 21. On remand, the Region must modify the permit to reflect these changes.

5. *Interim Measures Provision*

GMC contends that North Plant Permit Condition III.H.[17] (Interim Measures) is "arbitrary and unreasonable and a denial of due process" because: (1) the Region may require interim measures without a finding of "an immediate and significant threat"; (2) GMC has no opportunity to object to the interim measures selected by

[16] We note that if GMC can establish that air has not been impacted by the release and that characterization of the air surrounding the North Plant facility is therefore unnecessary, GMC may request a permit modification, and we would urge the Region to respond positively to such a request. *See RCRA Corrective Action Plan (Interim Final),* p.1 (June 1988) (OSWER Directive 9902.3) ("[i]f there is sufficient information on a site to preclude an air release, then it would not be necessary to require the owner/operator or respondent to perform an air contamination characterization.").

[17] Permit Condition III.H. states, in part:

> If during the course of any activity initiated under this Corrective Action Schedule of Compliance, the Regional Administrator determines that a release or potential release of hazardous waste, including hazardous constituents from a SWMU, poses a threat to human health and the environment, the Regional Administrator may specify interim measures. The Regional Administrator shall determine the specific action(s) that must be taken to implement the interim measure, including potential permit modifications and the schedule for implementing the required measures. The Regional Administrator shall modify the Corrective Action Schedule of Compliance either according to the procedures in Section III.M. of this permit or according to the permit modification procedures under 40 CFR 270.41, to incorporate such interim measures into the permit.

the Region; and (3) to the extent the remedial measures are not coordinated with ongoing remediation efforts, they are improper.

The Agency places strong emphasis on the use of interim measures to initiate expedited remediation where necessary at RCRA facilities that require corrective action. *In re BFGoodrich Company,* RCRA Appeal No. 89–29, at 7 (Adm'r, Dec. 19, 1990); 55 Fed. Reg. 30,838–39 (July 27, 1990). As the permit makes clear, however (*see supra* n.17), no such measures may be required unless the Region finds that they are necessary to protect human health and the environment.[18] GMC's assertion that the permit allows the Region to arbitrarily impose interim measures is therefore rejected.

Permit Condition III.H. states that the permit will be modified to incorporate the interim measures selected by the Regional Administrator according to the procedures in Permit Condition III.M. (Modification of the Corrective Action Schedule of Compliance)[19] or the

[18] *See RCRA Corrective Action Interim Measures Guidance (Interim Final),* at 1 (June 1988) (The implementation of interim measures must be related to human health and the environment).

[19] Permit Condition III.M. provides, in part:

> If at any time the Regional Administrator determines that modification of the Corrective Action Schedule of Compliance is necessary, he or she may initiate a modification to the Schedule of Compliance according to the procedures of this section. If the Regional Administrator initiates a modification, he or she shall:
>
> 1. Notify the Permittee in writing of the proposed modification and the date by which comments on the proposed modification must be received;
>
> 2. 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 * * *.
>
> a. 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.
>
> b. 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.
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> 3. Notify the Permittee in writing of the final decision.
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> a. 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 * * *.
>
> b. If written comment was received, the Regional Administrator shall provide notice of the final modification decision in a locally distributed newspaper * * *.

modification procedures of 40 C.F.R. § 270.41. GMC objects to the abbreviated modification procedure in Permit Condition III.M. on the grounds that it does not provide for administrative review of modifications initiated and finalized by the Regional Administrator as required by the existing regulation on modifications at 40 C.F.R. § 270.41. *See* Petition for Review at 22–29. GMC is correct in noting that the permit's abbreviated modification procedure represents a change in existing regulatory requirements set forth in 40 C.F.R. § 270.41. Because this procedure has not been adopted by regulation, the Region must remove Permit Condition III.M. from the permit and revise Permit Condition III.H. to specify that Agency-initiated modifications to incorporate interim measures must proceed according to the existing modification procedures in 40 C.F.R. § 270.41.

Finally, GMC's concern that interim measures will not be coordinated with voluntary remediation efforts is unfounded. As noted above, the Region has indicated that it will evaluate GMC's ongoing remediation efforts for equivalency to HSWA corrective action requirements. Nothing in the permit or in the record on appeal indicates that these remediation efforts would be ignored in determining what (if any) interim measures would be necessary in the event of a newly discovered release. Review is therefore denied.

6. *Due Process*

In its petition for review of the North Plant permit GMC objects to certain permit provisions allowing the Regional Administrator to revise (or require GMC to revise) certain interim submittals prepared during the corrective action process without complying with the Agency's permit modification rules (40 C.F.R. Parts 124 and 270) and without an opportunity for an administrative appeal. Once approved by the Regional Administrator these submittals then become an enforceable part of the permit. According to GMC, these provisions deprive it of its constitutional right of due process.

The Board has recently granted review and scheduled oral argument on issues that bear on the scope and effect of the Agency's authority to revise interim submittals. *See In re Allied-Signal, Inc,* RCRA Appeal No. 92–1 (EAB, Nov. 3, 1992). The Order Granting Review and Scheduling Oral Argument lists 6 issues that the parties in *Allied-Signal* should address in their briefs and should be prepared to discuss at oral argument. In light of this, we grant review on

the due process issue with regard to the North Plant permit.[20] The parties shall file briefs addressing the following issues:

> 1. The Administrator ruled in *In re W.R. Grace & Company,* RCRA Appeal No. 89–28 (Adm'r, March 25, 1991) that a Region's revision of an interim submission is not a modification of the permit for purposes of the formal modification rule at 40 CFR § 270.41. In contrast, the selection of a remedy is treated as a modification of the permit that is subject to the formal modification rule. [Permit Condition III K]. What is the legal or policy basis for treating the selection of a remedy as a permit modification, while not treating the Region's revision of an interim submission as a permit modification? In other words, how does the Agency decide that some, but not all, new permit terms will be incorporated into the permit through means of the formal permit modification procedures?
>
> 2. The *Grace* decision requires that in the event of a Regional revision of an interim submission, the Region must provide the permittee with some sort of informal "hearing" procedure in order to satisfy the requirements of procedural due process. Would the following procedure satisfy the requirements of procedural due process: (i) the Region must give a reasoned explanation in writing of its revision; (ii) the permittee must be provided with an opportunity to demonstrate, through written comments, that the Region's proposed revision is unnecessary; and (iii) the Region must consider the permittee's comments and provide a written response to them?
>
> 3. If the informal hearing procedure outlined in paragraph 1 would not satisfy the requirements of procedural due process, what additional Agency procedures would be necessary to satisfy those requirements?

[20] Although the petition for review of the South Plant permit also raises a due process issue regarding the corrective action portion of that permit, the South Plant permit does not require GMC to perform any corrective action and GMC has failed to identify any specific permit conditions that would arguably result in a denial of due process. Review of this issue is therefore denied with regard to the South Plant permit.

> 4. If the Board determines that a particular informal hearing procedure is necessary to satisfy the requirements of procedural due process, should the Board require the Region to incorporate that procedure in the permit?
>
> 5. Does the *Grace* decision, by holding that the revision of an interim submission is not a permit modification under 40 CFR §270.41, unlawfully deprive permittees of a statutory right to judicial review by preventing permittees from invoking Section 7006(b), which provides that any interested person may obtain judicial review of the Administrator's action modifying the permit in the U.S. Court of Appeals?
>
> 6. If GMC is unable to obtain judicial review under Section 7006(b), when and under what circumstances could GMC obtain judicial review of a Regional revision of an interim submission?

Briefs must be submitted by December 9, 1992.

7. *Authority To Modify the Permit Under RCRA §3005(c)(3)*

Permit Condition I.B. (in both the North and South Plant permits) states, in part:

> This permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR 270.41, 270.42, and 270.43. This permit may also be reviewed and modified at any time by the U.S. EPA, for causes specified in 40 CFR 270.41, *and as determined necessary to protect human health and the environment, pursuant to Section 3005(c)(3) of RCRA, 42 U.S.C. §6925(c)(3).*

(Emphasis added). GMC objects to the underlined portion of the above-quoted language. Specifically, GMC contends that the Agency does not have unlimited authority under RCRA §3005(c)(3) to review and modify an existing permit. Rather, according to GMC, this authority is limited by the requirements in 40 C.F.R. §270.41.[21] Petition for Review at 30–31. We agree.

[21] 40 C.F.R. §270.41 lists several causes for permit modifications and states that "[i]f cause does not exist under this section, the Director shall not modify or revoke

As the Board has recently noted, by promulgating 40 C.F.R. § 270.41 (a) & (b), the Agency has restricted its ability to unilaterally modify existing permits. *In re Waste Technologies Industries, East Liverpool, Ohio,* Consolidated RCRA Appeal Nos. 92–7 *et alia,* at 10 (July 24, 1992). Thus, "the Agency may not invoke § 3005(c)(3) to bypass these regulations, for it is axiomatic that the Agency must follow its own regulations. *Service* v. *Dulles,* 354 U.S. 363, 372 (1957)." *Id.* Accordingly, the Region must delete the following language from the second clause of the second sentence of Final Permit Condition I.B. of the North and South Plant Permits: "and as determined necessary to protect human health and the environment, pursuant to Section 3005(c)(3) of RCRA, 42 U.S.C. § 6925(c)(3)."

This conclusion does not mean that the Region is powerless to modify or terminate the permit should it discover that any permitted activity endangers human health and the environment. On the contrary, should such a situation arise, the Region has several available options. For example, the regulations allow the Region to initiate a permit modification upon receiving new information (unavailable at the time the permit was issued) that would have justified different permit conditions at the time of issuance. 40 C.F.R. § 270.41(a)(2).

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and reissue the permit, except on request of the permittee." The following are causes for permit modification:

> (a)(1) *Alterations.* There are material and substantial alterations or additions to the facility * * *.
>
> (2) *Information.* The Director has received information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance * * * and would have justified the application of different permit conditions at the time of issuance.
>
> (3) *New Statutory requirements or regulations.* The standards or regulations on which the permit was based have been changed by statute * * * or by judicial decision after the permit was issued.
>
> (4) *Compliance Schedules.* The Director determines that good cause exists for modification of a compliance schedule, such as an act of God, * * * or other events over which the permittee has little or no control and for which there is no reasonably available remedy.
>
> (b) *Causes for modification or revocation and reissuance.* The following are causes to modify or, alternatively, revoke and reissue a permit:
>
> (1) Cause exists for termination under § 270.43, and the Director determines that modification or revocation and reissuance is appropriate.
>
> (2) The Director has received notification * * * of a proposed transfer of the permit.

Moreover, procedures exist for modifying, revoking and reissuing, or terminating a permit if any permitted activity endangers human health and the environment and can only be regulated to acceptable levels by modification or termination. 40 C.F.R. §§ 270.41(b)(1), 270.43(a)(3). Thus, today's ruling only reaffirms that the Region's authority to review and modify existing permits under RCRA § 3005(c)(3) is limited by the above-cited regulations.

8. *Notice of Changes in Plant Operations*

GMC argues that Permit Condition I.D.10 (Reporting Planned Changes) in both the North Plant and South Plant Permits is beyond the scope of a HSWA permit. That condition provides:

> The Permittee shall give notice to the Regional Administrator of any planned physical alterations to the permitted facility as soon as possible, and at least 30 days before such alteration or addition is commenced.

GMC argues that this provision is overly broad in that alteration or additions to the facility may or may not be related to HSWA requirements. Only the State of Ohio, GMC contends, has the authority to administer the non-HSWA portion of the RCRA permit. GMC states that Ohio already receives relevant notices related to plant operations and the Region is therefore without authority to include such a requirement in the HSWA permit.

In support of this provision, the Region relies solely on 40 C.F.R. § 270.30(l)(1) which states that "[t]he permittee shall give notice to the director as soon as possible of any planned physical alterations or additions to the permitted facility." As the Board has recently concluded, however, in a split permit situation, with the non-HSWA portion being issued by an authorized State and the HSWA portion being issued by the Region, it is the responsibility of the State permitting authority to implement the requirements of 40 C.F.R. § 270.30. *See In the Matter of General Electric Company,* RCRA Appeal No. 91–7, at 34 (EAB, November 6, 1992). Thus, if the Region wishes to include a provision similar to the one at § 270.30(l)(1), it must rely on the corrective action rule at 40 C.F.R. § 264.101 and it must tailor such a provision so that it would apply only to those changes in plant operations affecting GMC's HSWA obligations. *Id.* Accordingly, on remand, if the Region wants to maintain this provision in the permit, it must adopt it under the authority of, and consistent

with the requirements of, the corrective action rule at 40 C.F.R. § 264.101.

9. *Definition of Hazardous Waste*

GMC objects to the permit's definition of "hazardous waste."[22] Specifically, GMC contends that the definition does not conform to the statutory definition at RCRA § 1004(5), 42 U.S.C. § 6903(5).[23] The only difference between the statutory definition of hazardous waste and the permit's definition is that, under the permit, the term "hazardous waste" includes hazardous constituents. Although hazardous constituents are not specifically mentioned in the definition at RCRA § 1004(5), this definition is in accord with the corrective action requirements imposed under the HSWA amendments. For example, RCRA § 3004(u), 42 U.S.C.A. § 6924(u), requires the Agency to impose corrective action requirements for all releases of hazardous waste *or constituents* from SWMUs. The legislative history of Section 3004(u) states that:

> This section is not limited to hazardous waste listed or identified under Section 3001 of the Act because it may be impossible to determine if hazardous constituents come from hazardous wastes as currently defined by the Administrator. The term "hazardous constituent" as used in this provision is intended to mean those constituents listed in Appendix VIII of the RCRA regulations.

H.R. Rep. No. 198, 98th Cong., 1st Sess. Part 1, 60–61 (1983). Thus, Congress clearly intended to expand the universe of hazardous wastes beyond those listed in section 3001 of RCRA by including hazardous

[22] Permit Condition III.B. defines "hazardous waste" as:

> a solid waste, or combination of solid wastes, which because of quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to an increase in mortality, or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. The term hazardous waste includes hazardous constituent as defined below.
>
> "Hazardous constituent" means any constituent identified in Appendix VIII of 40 CFR Part 261, or any constituent identified in Appendix IX of 40 CFR Part 264.

[23] Although GMC raised several other arguments in its petition for review, this was the only issue raised in its comments on the draft permit. *See* Comment 19.

constituents. *See In re Owen Electric Steel Company of South Carolina,* RCRA Appeal No. 89–37, at 4–6 (Adm'r, Feb. 28, 1992). The permit's definition is consistent with this approach.

10. *Photographs*

GMC argues that both the North and South Plant permits improperly allow the Region to photograph GMC's facility without adequate protection for the confidentiality of its trade secrets. GMC, however, cites no specific permit condition to which it objects. We gather, based on GMC's comments on the draft permit, that GMC is referring to Permit Condition I.D.8. (Inspection and Entry). This condition, however, makes no mention of photographs. Moreover, GMC has indicated that it agrees with EPA's rights to inspection and entry. GMC's Comments on Draft Permit, Comment 7 at A–2. Apparently, GMC is concerned that during inspections allowed under the permit the Region may decide to take photographs, and that these photos may not be treated as confidential business information. These concerns, without more, do not establish a link to a "condition" of the permit. Without such a link, there is no jurisdictional basis for the Board to examine GMC's concern, for only "condition[s] of the permit decision" are reviewable on appeal to the Board. 40 C.F.R. § 124.19. *See BFGoodrich Company, supra,* at 4 & n.6 (the intended application of a permit term is not subject to review under 40 C.F.R. § 124.19). GMC's concern in this regard does not contest any specific permit condition, nor does it allege that any of the Region's permit determinations were clearly erroneous or otherwise important enough to warrant review. Moreover, even if GMC were contesting a specific permit condition, both permits incorporate by reference the regulations at 40 C.F.R. Part 2, Subpart B, regarding the protection of confidential business information, and GMC has failed to convince us that these regulations would be insufficient to protect GMC's trade secrets. Accordingly, review is denied.

11. *Split Samples*

In commenting on the draft permits for both plants, GMC requested that the permits allow it to split samples. Although the Region agreed to this request, no such language was added to either permit. In its responses, however, the Region has agreed to revise both permits to include language guaranteeing GMC's right to split samples and the Region is ordered to do so on remand.

12. *Severability*

GMC argues that Permit Condition I.C. (Severability)[24] of both the North and South Plant permits conflicts with the language of 40 C.F.R. § 124.16(a)(2) (Stays of Contested Permit Conditions).[25] We find no conflict between these provisions. Permit Condition I.C. merely states the general proposition that severable portions of the permit remain in effect even if other portions of a permit are held invalid (presumably by the Board or a reviewing court). Section 124.16(a)(2), on the other hand, indicates that uncontested, *non-severable* portions of a permit are stayed along with contested provisions if the Board decides to grant review.

III. *ISSUES UNIQUE TO SOUTH PLANT PETITION*

1. *Permit Term*

GMC contends that the permit is internally inconsistent because the cover letter states that the duration of the permit is 10 years while Permit Condition I.D.3. states that the permit will expire in 5 years. GMC also states that the five year term in the permit was inadvertent and that "[t]he permit term should be at least 10 years as permitted under 40 CFR § 270.50(a)." Petition for Review at 7. None of these arguments convinces us that review is warranted.

First, the cover letter is not part of the final permit. Rather, it simply accompanies the final permit when it is mailed to the permittee. It notifies the permittee that a final permit determination has been reached and informs the permittee of the procedures for filing an appeal. Thus, any difference between the language of the cover letter and the permit does not create an internal inconsistency in the permit itself. Moreover, the Region has acknowledged the error in the cover letter and has stated that the permit's term is actually five years. Region's Response at 5.

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[24] Permit Condition I.C. states:

> The provisions of this permit are severable, and if any provision of this permit, or if the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected thereby.

[25] 40 C.F.R. § 124.16(a)(2) states:

> Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. Stayed provisions * * * shall be identified by the Regional Administrator. All other provisions of the permit * * * shall remain fully effective and enforceable.

Second, the record on appeal does not support the assertion that the five year term was inadvertent. The Fact Sheet describing the provisions of the draft permit as well as the draft permit itself proposed a 5 year term. In addition, as the Region states in its Response:

> The five year term coincides with the term of the State RCRA permit. Setting the same term for both portions of the permit will simplify the review and renewal process for both GMC and the regulatory agencies, as both will be reviewed at the same time.

Region's Response at 5.

Finally, GMC does not expressly challenge the five year term, nor does it give any reason why such a term is improper.[26] Review is therefore denied.

2. *Deletion of Permit Condition I.D.18*

In its response to comments on the draft permit,[27] the Region agreed to delete permit Condition I.D.18 but has failed to do so. The Region has acknowledged this oversight and has agreed to delete the provision. Region's Response at 10. Accordingly, on remand, the Region is ordered to delete this provision.

IV. *CONCLUSION*

The permits for the North and South Plants are remanded and the Region is directed to reopen the permit proceedings for the limited purposes mentioned above.[28] Appeal of the remand decision will not be required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii). For the reasons set forth above, review is granted with regard to the due process issue raised in the North Plant petition for review. Pursuant to Section 124.19(c), the Region is directed to give public notice of this grant of review in accordance with Section

[26] In comment #3 on the draft permit for the South Plant, GMC requested a permit term of 20 years. As the Region pointed out, however, 40 C.F.R. § 270.50(a) states that "permits shall be effective for a fixed term *not to exceed 10 years*." (emphasis added). Region's Response at 2.

[27] Response to Comments at 3.

[28] 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: Chemical Waste Management, Inc.*, RCRA Appeal No. 87-12, at 5 (Adm'r, May 27, 1988).

124.10. The public notice should set out the briefing schedule noted above and it should state that any interested person may file an amicus brief. The notice should be sent out within two weeks of this order to ensure that interested parties will have sufficient time to prepare and submit amicus briefs by December 9, 1992. On the other issues raised by GMC, review is denied for the reasons set forth above.

So ordered