# IN RE GMC DELCO REMY

RCRA Appeal No. 95-11

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

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Decided June 2, 1997

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### Syllabus

GMC Delco Remy ("GMC") seeks review of a permit modification of the federal portion of a permit issued by U.S. EPA Region V, under the 1984 Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992k. GMC's original permit was issued in 1990 and was comprised of both federal and State portions. As a result of the closure of the active regulated hazardous waste management unit at the facility, the State portion of the RCRA permit was not renewed and thus terminated at the end of its term. The purpose behind the Region's decision to modify the federal portion of the permit was to add newly identified solid waste management units ("SWMUs") to the corrective action requirements of the permit and to extend the term of the 1990 federal permit for an additional five years. The permit modification also made changes to other provisions of the permit.

GMC objects to the permit modification in its entirety and also objects to numerous specific provisions in the modified permit. GMC asserts that the Region lacked authority to issue the modification because the facility's preexisting RCRA permit expired prior to the effective date of the modification. This, says GMC, made the modification ineffective and also terminated the Region's ability to address the facility by any HSWA permit or permit modification. GMC also asserts that it had closed the only RCRA regulated unit at the facility, that the State permit had terminated for that unit, and that GMC refuses to apply for any HSWA permit or permit modification for the facility, all of which leaves the Region without any RCRA or HSWA authority over the facility that can be based upon permit requirements. GMC also contends that all of the specific conditions in the permit are inconsistent with EPA regulations or are illegally based upon policies which were never promulgated as regulations.

Held: The permit was timely modified. Although the modification's effective date came after the expiration of the 1990 federal permit, the important date for determining the timeliness of the modification was its date of issuance, which in this instance preceded the permit's expiration date. The Region also had the authority to require GMC to maintain a federal "corrective action only" permit, notwithstanding the termination of the State permit and closure of the facility's only regulated unit. There is nothing in the federal statute or regulations to suggest that the corrective action obligation expires when the need for the State-issued portion of the permit no longer exists. *See In re Adcom Wire*, 5 E.A.D. 84, 91 (EAB 1994). Section 3004(u) creates the broad duty to perform corrective action as a *quid pro quo* to obtaining a RCRA permit. *United Technologies Corp. v. EPA*, 821 F.2d 714, 722 (D.C. Cir. 1987). The permittee may not unilaterally abandon those ongoing corrective action responsibilities whenever it finds it expedient to discontinue the activities that prompted it to obtain its RCRA permit. Finally, GMC's challenges to individual permit conditions are rejected as insufficient to warrant their review.

***Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.***

***Opinion of the Board by Judge McCallum:***

## **I.** *BACKGROUND*

Petitioner, GMC Delco Remy ("GMC"), seeks review of a permit modification ("the Permit" or "Permit modification") issued to it by EPA Region V ("the Region") on October 23, 1995, pursuant to the 1984 Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq*. ("RCRA"). GMC did not apply for any new permit or permit modification. The Permit was issued by the Region, on its own initiative, for corrective action requirements to be taken at GMC's Delco Remy plant located at 2401 Columbus Avenue, in Anderson, Indiana ("the facility"),[1] and addressed seventeen solid waste management units ("SWMUs") at the facility. The Permit modification extended the term of the preexisting permit for an additional five years.[2]

In its petition for review ("GMC's Petition"), GMC objects to the Permit in its entirety and also objects to the Permit as to numerous specific provisions. GMC asserts that the Region lacked authority to issue the Permit because the facility's preexisting RCRA permit expired prior to the effective date of the Permit.[3] This, says GMC, made the Permit ineffective and also terminated the Region's ability to address the facility by any HSWA permit or permit modification. GMC also asserts that it had closed the only RCRA regulated unit[4] at the

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[1] The State of Indiana is authorized to issue RCRA permits, pursuant to RCRA section 3006(b), 42 U.S.C. § 6926(b). However, Indiana is not authorized to issue HSWA permits. *See In re Chemical Waste Management of Indiana, Inc*., 6 E.A.D. 144, 146 n.1 (EAB 1995). The Permit issued by the Region covered HSWA responsibilities.

[2] GMC Petition, Exhibit B at 6-7.

[3] While issued on October 23, 1995, the Region's Permit states that it does not take effect until December 7, 1995. Much of GMC's argument turns upon this point.

[4] "Regulated unit" is a term of art appearing in 40 C.F.R. § 264.90(a)(2). "A surface impoundment, waste pile, and a land treatment unit or landfill that receives hazardous waste after July 26, 1982 (hereinafter referred to as a 'regulated unit') must comply with the requirements of §§ 264.91 through 264.100 in lieu of § 264.101 for purposes of detecting, characterizing, and responding to releases to the uppermost aquifer." GMC's use of the term "regulated unit" does not appear to suggest that §§ 264.91-264.100 are at issue here. Neither is there any claim that any SWMU at issue is a "surface impoundment, waste pile, or land treatment unit or landfill that received hazardous waste."

facility, that the State had terminated the permit for that unit, and that GMC refuses to apply for any HSWA permit or permit modification for the facility, all of which leaves the Region without any RCRA or HSWA authority over the facility that can be based upon permit requirements. GMC also contends that all of the specific conditions in the Permit are inconsistent with EPA regulations or are illegally based upon policies which were never promulgated as regulations.

At the Environmental Appeal Board's request, on February 7, 1996, Region V responded to the GMC petition for review dated November 22, 1995. With the consent of the Board, GMC replied to the Region's response on March 14, 1996. Finding no clear error of fact or law reflected in the Region's permit decision, we are today denying the petition for review but are remanding certain portions of the Permit for revision in accordance with commitments made by the Region in its brief on appeal. Our reasons follow.

## **II.** *FACTUAL BACKGROUND*

The relevant facts in this matter are largely undisputed, and are alleged by GMC as follows. In November 1980, GMC submitted a RCRA part A Hazardous Waste Permit Application for the facility. In September 1985, GMC submitted a RCRA part B application.[5] In September 1990, the Indiana Department of Environmental Management ("IDEM") and the Region separately issued the required RCRA/HSWA permit portions. The 1990 federal portion of the permit required GMC to investigate, and possibly correct, the two then-known SWMUs at the permitted facility. GMC Petition at 2, Exhibit A at 10-12.

Later, in March 1994, at the Region's request, IDEM issued a RCRA Facility Assessment ("RFA").[6] The RFA identified a total of 78 SWMUs, and concluded that no corrective action was required for 68 of them, that 4 SWMUs needed improved "housekeeping practices," and that 6 SWMUs needed investigation. GMC Petition at 3; Region's Response Exhibit B. In December 1994, GMC certified to IDEM, by letter, that the only remaining regulated unit at the facility, "the container storage

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[5] For a discussion of the process of obtaining a RCRA permit, addressing both parts A and B, see *In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 23-24 n.30 (EAB 1997).

[6] A detailed description of the corrective action process and the numerous steps that it may entail can be found in *In re Amoco Oil Co.*, 4 E.A.D. 954, 962 n.10 (EAB 1993) (citing *In re Sandoz Pharmaceuticals Corp.*, 4 E.A.D. 75 (EAB 1992)).

unit[,] had been closed in accordance with the approved closure plan and applicable RCRA closure standards." IDEM approved the certification, by letter, in April 1995, "and thus, the Plant[7] no longer operates a hazardous waste management unit."[8] GMC Petition at 3. By letter, May 1995, GMC requested that IDEM terminate the IDEM permit and "change the Plant's status to 'exempt generator accumulation.'" IDEM terminated its portion of the 1990 permit and, by letter of June 2, 1995, informed GMC that "it had changed the Plant's status to 'conditionally exempt small quantity generator.'" [9] *Id*.

Earlier, however, in February 1995, the Region had sent the facility an "extensive request for information * * * regarding, among other things, seventy-eight units[10] or areas of the Plant which EPA apparently believes should be designated as SWMUs."[11] GMC Petition at 3-4; Region's Response Exhibit C. In the cover letter to its request for information, the Region referred to the IDEM RFA Report as descriptive of the SWMUs at the facility. The Region requested additional information from GMC based upon the information in IDEM's report and recommendations. *Id*. In May and September 1995, while asserting that the Region lacked authority to require corrective action at the facility, GMC provided "extensive information," "[i]n the spirit of cooperation." GMC Petition at 4; Region's Response Exhibits I, Q. The Region did not accept any conclusions by GMC or IDEM that would indicate that no corrective action was needed. However, the Region utilized the information that it had received from IDEM and from GMC before it made a final decision on corrective action. GMC Petition at 3-4.

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[7] GMC does not use the term "facility" in its Petition. We assume that when GMC uses the term "the Plant," that GMC means the facility or some sub-unit of the facility. *See In re Navajo Refining Co.*, 2 E.A.D. 835-37 (Adm'r 1989) (interpreting the meaning of "facility" as used in RCRA § 3004(u) and citing *United Technologies Corp. v. EPA*, 821 F.2d 714, 721-22 (D.C. Cir. 1987)). *See also* the definition of "facility" in 40 C.F.R. § 260.10.

[8] "Hazardous waste management unit" is a term of art, defined in 40 C.F.R. § 270.2. There is no indication that GMC's use of this term impacts upon any issue in this case.

[9] Modified by letter of June 7, 1995, to "'large quantity' generator."

[10] We assume that these are the same 78 SWMUs as appear in the RFA.

[11] GMC later notes that there were also six areas of concern ("AOCs") set out in the Permit. GMC Petition at 14-15, Exhibit B at 7. AOC is a broader term than SWMU. An area may be an AOC even if it is not a SWMU if, for example, there are known or suspected releases of hazardous wastes or hazardous constituents which pose a threat to human health or the environment. *See In re Sandoz Pharmaceuticals Corporation*, 4 E.A.D. at 79-80*; In re Morton International, Inc.*, 3 E.A.D. 857, 863-65 (Adm'r 1992). EPA may require corrective action for AOCs pursuant to RCRA § 3005(c)(3), the "omnibus provision." *Id*. The specifics of the six AOCs are not at issue in this appeal.

A meeting ensued in June, where, preserving its claims, GMC expressed an interest in cooperating, and asked the Region for a plan of action. The Region chose to proceed by means of an Agency-initiated permit modification, pursuant to 40 C.F.R. § 270.41(a)(2), and listed the SWMUs which it believed needed investigation for "further RCRA corrective action." In accordance with 40 C.F.R. § 124.5(c)(1), the Region prepared a draft permit incorporating the proposed modifications, and then proposed the Permit modification for public comment on or about June 29, 1995. By letter of July 5, 1995, GMC, while continuing to disagree as to the Region's authority, expressed conditional willingness to conduct corrective action under an Agency-initiated permit modification.[12] GMC Petition at 4.

GMC challenges the Region's authority to issue the Permit modification because the 1990 permit had expired before the effective date of the modification. GMC also challenges the Region's authority to issue the Permit because GMC was not seeking a permit at the time that the Permit became "effective." It is GMC's position that it must either be currently holding a valid permit or be seeking one before the statute empowers EPA to impose corrective action obligations by means of a federally issued RCRA corrective action permit. GMC Petition at 7-13. For its part, the Region does not appear specifically to dispute this general proposition in the context of the facts of this case,[13] but instead asserts that the Permit modification was "issued" prior to the expiration of the 1990 permit, thus supplying the essential legal nexus for corrective action. Additionally, GMC also challenges the Permit because it addresses only corrective action measures. GMC asserts that there cannot be a corrective action only permit. GMC Petition at 9-12. Finally, GMC challenges numerous specific Permit conditions, which challenges the Region, in turn, rejects as being without merit.

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[12] In the introduction portion of its petition for review, GMC alleges that the Permit modification was issued pursuant to 40 C.F.R. § 270.42, "a Class III modification." Petition at 1. GMC objected, claiming that "Class III" permit changes are at the permittee's request and that GMC did not request the change. *Id*. However, it is clear as a factual matter that the Permit was issued on the Region's own initiative, pursuant to 40 C.F.R. § 270.41.

[13] Among other things, the Region states in its Response to GMC's Petition, at 13, that it "had to act quickly when it learned that Petitioner had sought successfully to close its regulated unit, to ensure corrective action would be completed;" also, at 4, "because the closure of the remaining regulated unit signaled that GMC was unlikely to file an application for [a] renewed permit that would provide a framework for continued corrective action at the facility * * *;" and, at 23, "EPA intends only to ensure that activities required by HSWA occur within the context of a permit, so that they are undertaken timely and with U.S. EPA's approval, as appropriate."

## **III.** *DISCUSSION*

### A. *Scope of Review on RCRA Permit Appeals*

Under the rules governing this proceeding, the Regional Administrator's permit decision ordinarily will not be reviewed unless it is based upon 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 sparingly exercised," and that "most permit conditions should be finally determined at the Regional level ***." *Id*. The petitioner bears the burden of demonstrating that review is warranted. *See In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 144, 150 (EAB 1995); *In re Ross Incineration Serv., Inc.*, 5 E.A.D. 813, 816 (EAB 1995).[14]

### B. *RCRA Corrective Action Authority*

The Region's corrective action authorities principally derive from the following statutory and regulatory provisions.

RCRA section 3004(u), 42 U.S.C. § 6924(u), provides in relevant part:

> Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit.

Title 40 C.F.R. section 264.101(a), which is simply a codification of RCRA section 3004(u), provides as follows:

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[14] Additionally, the burden is on the petitioner to demonstrate that the issues it seeks to present to the Environmental Appeals Board were raised before the Region during the comment period, and that the Region's responses to those comments were inadequate. *See In re Exxon Co., U.S.A.*, 6 E.A.D. 32, 38-39 n.7 (EAB 1995); *In re Waste Technologies Indus.*, 5 E.A.D. 646, 658 (EAB 1995). The petitioner must raise its claims before this Board in clear and specific terms, providing argument showing why the Region's decision should be reviewed. *See In re Environmental Waste Control, Inc.*, 5 E.A.D. 264, 269 (EAB 1994).

> The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.

Title 40 C.F.R. section 264.101(a) has been held to be an interpretive rule. *United Technologies Corp. v. EPA*, 821 F.2d at 718-20.

C. *The Permit Was Timely Modified*

GMC attacks the Region's authority to issue the Permit modification for several reasons. GMC's first argument is that the federal portion of the 1990 permit for the facility had ended, leaving nothing to modify.[15] This allegedly occurred because GMC did not apply for an extension of the 1990 permit, and the Region's Permit modification, while issued prior to the expiration date of the 1990 permit, had an effective date that was forty-five days later, after the expiration date of the 1990 permit. This, GMC asserts, caused a lapse and made the Permit modification a nullity. However, as discussed below, we conclude that the Region correctly followed the regulatory process for the issuance of a permit modification and timely issued the Permit without any lapse in the permitting process.[16]

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[15] GMC Petition at 7.

[16] We have described the process of RCRA permit modification as follows:

> The procedures specified in §§ 270.41 and 270.42 are general rules for effecting changes to permits (*e.g.*, permit modifications) whether initiated by the permit user or by the permittee. Under these procedures, significant permit modifications are effected through a process that resembles issuance of a permit, with requirements for issuing a draft modification, an opportunity for public comment on the draft modification, and issuance of the final permit modification, which in turn, is appealable to the Environmental Appeals Board for a final decision before it becomes effective. *See generally* 40 C.F.R. § 270.41 and Part 124.

*In re Allied-Signal Inc. (Frankford Plant)*, 4 E.A.D. 748, 753 n.4 (EAB 1993). (Note, however, there are exceptions for certain minor changes to permits. *See In re Waste Technologies Indus.*, 4 E.A.D. 106, 113 nn.12 and 13 (EAB 1992)).

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GMC's initial permit for the facility was issued September 24, 1990, with an expiration date of October 24, 1995. The 1990 permit expressly provided for corrective action, both for then known SWMUs (Part IV.E) and also for later identified SWMUs (Part IV.D). Future permit modifications to address new SWMUs were contemplated (Part IV.D.2). EPA regulations expressly authorize the Agency to make permit modifications on its own initiative in certain circumstances, including when new information, such as IDEM's RFA and the material developed by additional information requests based upon the RFA, comes to the Agency's attention. 40 C.F.R. § 270.41. That is the procedure which was utilized by the Region in this case. GMC does not deny that the Region was in receipt of significant amounts of new information when it took action to modify the permit.[17] In response to information received, and not available when the 1990 permit was issued, the Region proposed the Permit modification, addressing new SWMUs, on or about June 29, 1995. It then issued the final Permit modification decision on October 23, 1995 (*i.e.*, one day before expiration of the 1990 permit), to be effective on December 7, 1995. It is clear from these facts that the Permit modification was issued prior to the expiration of the 1990 permit.[18]

GMC would nevertheless have us focus on the effective date of the Permit modification rather than the date when it was actually issued by the Region, thus enabling GMC to argue that the Permit modification is invalid because by the effective date of the Permit modifi-

> We have also noted that Agency-initiated permit modifications must be for specific cause.
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> > Under 40 C.F.R. § 270.41, which governs Agency-initiated modifications of RCRA permits, the Agency may modify a permit if it determines that one or more "causes for modifications" are present. The causes for modification are listed in the regulation. One of those causes is that the Region has received information that was not available at the time of permit issuance and which would have justified the application of different permit conditions at the time of issuance if it had been available.

*In re General Electric Co.*, 4 E.A.D. 615, 623 (EAB 1993); *cf. Waste Technologies Indust.*, 4 E.A.D. at 112.

[17] The closest that GMC comes to a denial on this point is to imply in its Reply, at 13, that if EPA had knowledge of the existence of a SWMU site, then the regulations addressing new knowledge cannot be invoked for that SWMU. This is incorrect. Knowing about a SWMU does not mean that there cannot be additional information about that SWMU prompting further action.

[18] 40 C.F.R. § 270.41(a)(2) expressly states, in the case of Agency- initiated permit modifications for cause, where the basis for the modifications is new information coming to the Agency's attention, that permits may modified "*during their terms*" (emphasis added).

cation, the 1990 permit had ended, leaving the Region with no permit to modify. Petition at 7-8. This argument seems hypertechnical in the extreme and ignores the reality of what the Region was trying to accomplish by postponing the effective date. In the Region's opinion, the Permit could not be made effective immediately because that would deprive GMC of its appeal rights. Region's Response at 9-10. "[P]ursuant to the Region's standard procedure, [the Permit] established an effective date that post-dated the date of issuance by forty-five days to afford Petitioner time to appeal, if it so chose. *See* 40 C.F.R. § 124.19."[19] *Id*. at 9. Whether the grace period for filing an appeal was necessary as a matter of law is not important and we do not reach that issue, for in our opinion the date of issue of the Permit controls here, not the effective date. The reason for this is that the effective date of a permit, unlike the date of issuance, is not necessarily a fixed date that is always discernible in advance; it can be more like a moving target. Under 40 C.F.R. § 124.19, a permittee or any interested person may appeal the Region's RCRA permit decisions, or the Environmental Appeals Board ("EAB") may elect to review the permit on its own initiative. In such circumstances, sections 124.15(b) (2) and 124.19 operate together to provide that the RCRA permit provisions being appealed are not final until after the decision of the EAB, which may not occur until many months after the original specified effective date. Hence, the effective date of a RCRA permit may not be within the Region's or even the permittee's control.[20] It is more reasonable, therefore, to construe the date for measuring the timeliness of a permit modification as the date of issuance, not the effective date.[21] The date of issuance is fixed and ascertainable. At most, GMC may have shown that it had no obligations under any permit between the time that the Permit modification was issued and the time when it became effective. This does not mean that there was no valid permit in existence.[22]

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[19] 40 C.F.R. § 124.19(a) provides for appeal to the Environmental Appeals Board within a 30 day period from notice of the Region's action, unless a later date is specified in the notice. The Region may have provided 45 days in order to allow for any problems with providing actual notice to GMC. GMC does not allege that providing of 45 days instead of 30 days is of any consequence.

[20] Most permittees presumably do not want their permits to lapse merely because, for example, a third party has decided to seek review of the permit under § 124.19(a).

[21] In a case where a permit was timely applied for, *see United States v. Bethlehem Steel Corp.*, 829 F. Supp. 1023, 1026-27 (N.D. Ind. 1993) (pursuant to 40 C.F.R. § 124.5(c)(2), when a new permit is prepared the old permit remains in effect until the new permit is final, therefore the effective date of the new permit is not controlling).

[22] Two regulatory provisions help explain this result. 40 C.F.R. § 124.16 provides generally that contested provisions of a permit are stayed pending their resolution on review by the EAB,

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D. *The Region Had Authority to Require GMC to Maintain a "Corrective Action Only" Permit*

GMC argues that EPA lacks RCRA/HSWA authority to require the facility to maintain a federal "corrective action only" permit following closure of the facility's only regulated unit. It begins the argument by asserting that a facility is only required to maintain a permit during its "active life," 40 C.F.R. § 270.1(c), which GMC alleges, ends with the certificate of final closure.[23] GMC Petition at 9. GMC elaborates as follows:

> GM certified closure of the container storage unit (the only RCRA regulated item) at the Plant. IDEM approved the Plant's closure certification and terminated the IDEM permit. The Plant does not require a post-closure permit because the container storage unit has been clean closed. Therefore, the Plant is not required to maintain a RCRA permit and the Permit terminated in accordance with its terms (*i.e.*, on October 24, 1995).
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> By issuing the Permit Modification, EPA is attempting to create an entirely new regulatory device, which

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whereas uncontested provisions remain in effect to the extent they are severable from the contested provisions. *See* 61 Fed. Reg. 65,268, 65,281 (Dec. 1, 1996) (interpreting 40 C.F.R. § 124.16(a)(2)). 40 C.F.R. § 124.5(c)(2) provides, in the case of permit modifications, that only the conditions to be modified are subject to reopening. Therefore, in a situation where a permittee contests an Agency-initiated permit modification, these two regulations operate to bar the permittee from contesting provisions unrelated to the modification, and as for the provisions related to the modification, they are stayed during the appeal only to the extent that the permittee has contested them. Where the permittee is contesting an extension of the permit's term, a legitimate question may arise as to which provisions of the permit are severable from the term of the permit. If the original term of the permit has not yet expired, we have no difficulty in concluding that all of the permit's provisions remain in effect, except to the extent they are contested. If, on the other hand, as here, the original term of the permit has expired, an argument can be made that none of the permit's provisions are severable from the contested expiration date, and, therefore, all of the permit provisions are stayed by reason of the challenge to the expiration date. We need not resolve that question, however, for purposes of this appeal. What we do decide is that no matter how the severability issue is resolved, the permit remains in effect—albeit only in a strictly inchoate sense if all of the permit provisions are deemed to have been stayed. This is because the severability issue goes to the question of which provisions of the permit are stayed, not to whether the permit still exists. There is no suggestion in the cited regulations that the mere staying of permit provisions, or even all of them, renders the permit void and therefore legally nonexistent.

[23] This appears to be part of an assertion that GMC's facility is not in any class that requires a post-closure permit. *See* 40 C.F.R. § 270.1(c). There is no claim before us that the Region has addressed whether GMC would be required to obtain a post-closure permit. We express no opinion on the matter.

> might be termed a "corrective action only" permit, without authority to do so. No promulgated regulation requires GM to maintain a RCRA permit for the Plant following closure of the regulated unit.

GMC Petition at 9-10.[24]

We have held that the central premise for this argument is false: there does not need to be an unexpired State RCRA permit still in effect before the Region may issue a HSWA permit requiring corrective action. *In re Adcom Wire*, 5 E.A.D. 84, 91 (EAB 1994) ("[W]e can find nothing in the federal statute or regulations to suggest that the corrective action obligation expires when the need for the State-issued [permit] portion no longer exists.").[25] Additionally, in the post-closure permit context, we have rejected the argument that an assertion that a facility has closed removes the facility from the reach of RCRA section 3005(a), and that therefore no corrective action permit can be imposed.[26] *See In re B.F. Goodrich Co.*, 3 E.A.D. 483, 484-85 (Adm'r 1990). We have also held that investigations for releases may be required at SWMUs designated as inactive. *See In re Brush Wellman, Inc.*, 4 E.A.D. 210, 212 n.5 (EAB 1992).

Moreover, the Region need not accept, for HSWA purposes, State determinations where the State is not HSWA authorized. *See In re General Motors Corp.*, 5 E.A.D. 400, 408 (EAB 1994). EPA has the HSWA responsibility for the facility and must make its own decision.[27] *See In re Allied-Signal Inc.*, 5 E.A.D. 291, 296 (EAB 1994). Neither GMC nor IDEM's actions foreclosed the Region from determining that

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[24] Reiterated later in a somewhat different form. GMC Petition at 10 *et seq.*

[25] GMC cites to an EPA guidance document for support. *Guidance on Permitting Issues Related to the Dupont Edgemore Facility*, dated July 1, 1988, from Bruce R. Weddle, then Director of the Permits and State Programs Division. GMC Petition at 8; Petition Exhibit D. This document squarely states that the Region may issue a corrective action permit modification after the State portion of a RCRA/HSWA permit has expired.

[26] See also *American Iron and Steel Institute v. EPA*, 886 F.2d 390, 396-97 (D.C. Cir. 1989), which notes that, although it does not appear on the face of the opinion, the decision in *United Technologies v. EPA* held that corrective action could be required for both post-closure permits and permits-by-rule. We have noted this result. See *In re B.F. Goodrich Company*, 3 E.A.D. 483, 484 n.2 (Adm'r 1990).

[27] Neither can a permittee unilaterally preempt the RCRA investigatory process by declaring that it has done its own investigation and reached its own conclusions. *In re General Motors Corporation*, 5 E.A.D. at 404:

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the facility was still in need of corrective action under HSWA. Indeed, the Region had an obligation to make its own decision on corrective action requirements.

We also reject GMC's assertion that a "corrective action only" permit would be a new form of permit not envisioned by statute.[28] GMC Petition at 9-10. It is clear that, in appropriate cases, EPA may issue a "corrective action permit." *See Adcom Wire*, 5 E.A.D. at 91:

> Indeed, Adcom's contention that a corrective action permit must be tied to a continuing State-RCRA permit runs directly contrary to the corrective action program. We can easily envision circumstances where the corrective action portion of a permit will continue long after the non-HSWA portion of the permit has expired. * * * [U]nder § 3004(u) Adcom's HSWA obligations were triggered once a RCRA permit was required and * * * the HSWA obligations did not expire until completed.

In accordance with section 3004(u), all permits issued after November 8, 1994, must contain corrective action requirements. "Section 3004(u), in essence, creates the broad duty to take corrective action as a *quid pro quo* to obtaining a permit." *United Technologies Corp. v. EPA*, 821 F.2d at 722. Once the owner or operator of a facility receives a permit for treating, storing or disposing of hazardous waste, it makes no sense to say that the permittee can simply unilaterally abandon ongoing corrective action responsibilities whenever it finds it expedient to discontinue the activities that prompted it to obtain a permit in the first instance. While it may be true in some cases that a permit would no longer be required for the discontinued hazardous waste management activity, the same would not necessarily be true of

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> We conclude, however, that the permit reasonably calls for the Region, rather than Delco, to determine whether future releases at Delco's plant threaten human health or the environment or are otherwise "significant" from the standpoint of the corrective action process.

S*ee also In re Delco Electronics Corporation*, 5 E.A.D. 475, 478-79 (EAB 1994).

[28] This argument is reiterated in slightly different forms. GMC Petition at 10, 13-14, 16, 19. At Petition page 16, GMC asserts that since the Region's actions must be construed as an entirely new permit, then everything in that permit must have been reopened for comment, including the standard permit conditions under 40 C.F.R. § 270.30. Because we find that the Region did not create a whole new kind of permit, we agree with the Region that conditions of the old permit which were not changed by the Permit have not been generally reopened. *See infra* Section III.F.

pending corrective action. In cases where closure of a facility's regulated units does not coincide with completion of corrective action, a permit for "corrective action only" is a logical mechanism for assuring that the facility completes the obligation it assumed as a condition of getting a permit in the first place.

Congress understood that some facilities may have inactive units but should nonetheless be under a duty to carry out corrective action at such units. The legislative history of the HSWA makes it clear Congress intended the amendments to subject all RCRA permitted facilities to corrective action regardless of their active status. H.R. Conf. Rep. No. 98-1133, at 92 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5663, provides that:

> The purpose of this [corrective action] provision is to ensure that all facilities which seek a permit under section 3005(c) take all appropriate action to control and cleanup all releases of hazardous constituents from all solid waste management units at the time of permitting the facility. * * * The Conferees believe that all facilities receiving permits should be required to clean up all releases from all units at the facility, *whether or not such units are currently active.*

(Emphasis added). The Senate, in which the section at issue originated, in turn, underscored the ongoing nature of corrective action, regardless of whether the releases occurred before or after the date of permit issuance:

> Corrective action is required whether or not the unit at which a release occurred is still in operation. The owner or operator of a hazardous waste management facility will not be allowed to escape the responsibility to take corrective action by closing a unit at which a release has occurred and limiting the permit application for the facility to other units at the site.
>
> The requirement for corrective action is a continuing one, applying not just to releases that have occurred prior to permit issuance, but also to any releases that occur after permit issuance.

S. Rep. No. 98-284, at 31-32 (1983).

Given the foregoing legislative history, we have little doubt that ongoing corrective action should continue by means of a "corrective action only" permit in the circumstances presented here. The Permit modification for GMC's facility, including the corrective action requirements, was issued pursuant to section 3004(u) in response to new information and the consequent belief by the Region that releases at the facility were probable.[29] RCRA section 3005(c)(1), 42 U.S.C. § 6925(c)(1), authorizes EPA to modify permits to conform to the requirements of RCRA section 3004, which requires corrective action in such circumstances.[30] Obviously, as discussed above and as we noted in *Adcom Wire*, 5 E.A.D. at 91, there will be times when the only activity that remains in a permit that once encompassed regulated units is the corrective action needed to be taken at the end of the facility's operational life, the situation that GMC asserts to be the case here.[31] In fact, it is very likely that the process of closing a facility could expose problems which could not be seen while the facility was operating at full scale and would need to be addressed in some appropriate manner. Significantly, GMC knew when it applied for its original permit in 1985 that it would have to perform corrective action at the facility. The 1990 permit expressly so provided in its Part IV. GMC can hardly claim surprise when the Region insisted upon receiving the congressional *quid pro quo* for the 1990 permit by requiring that the corrective action provisions be modified from time to time to reflect current states of knowledge, such as the information contained in IDEM's RFA and the further information provided by GMC in response to the Region's requests based upon that RFA. Indeed, RCRA permits are often issued before the full scope of required corrective action is known. *See In re General Electric Co.*, 4 E.A.D. 615, 617-18 (EAB 1993) (additional corrective action steps required after permit issuance); *cf.* RCRA section 3004(u) ("Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action where such corrective action cannot be completed prior to issuance of the permit."). Consequently, GMC had no reasonable basis for believing that its 1990 permit would not be modified at some

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[29] Region's Response, Exhibit S, the Permit, Response to Comments, at 8-10.

[30] RCRA section 3005(c)(1) provides in pertinent part as follows:

> [I]n the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 [RCRA section 3004] of this title, the permit shall specify the time allowed to complete the modifications.

[31] As the court put it in *American Iron and Steel Institute v. EPA*, 886 F.2d at 393, RCRA reaches "well beyond the grave."

time during its 5-year term so as to require additional corrective action. Extension of the permit's term for an additional five years to facilitate completion of corrective action is simply a matter of common sense given the new information coming to the Region's attention. Under the circumstances, therefore, we find no merit in GMC's contention that the Agency has no authority to issue a corrective-action-only permit.[32]

E. *Miscellaneous Contentions*

*Other Remedies.* GMC suggests that acceptance of its theory that corrective action authority under HSWA has lapsed will do no harm as EPA would still have its powers to clean up the facility under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), including CERCLA section 106, and also its powers under RCRA sections 3013 ("order[s] requiring * * * monitoring, testing, analysis and reporting") and 7003 (orders or suits in response to situations which "may present an imminent and substantial endangerment to health or the environment"); 42 U.S.C. §§ 6934 and 6973.[33] GMC is wrong in suggesting that no harm would come from adoption of its position. As discussed in the margin below,[34] the intent of Congress in enacting the corrective action authorities was in part to avoid burdening the CERCLA process and the Superfund with active hazardous waste management facilities that could otherwise be cleaned up under RCRA by their owners or oper-

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[32] Indeed, a court has found that even failure to obtain interim status did not excuse a site owner from the corrective action responsibilities which are imposed upon those who do obtain interim status. To excuse those who fail to obtain interim status "would undermine congressional intent and be contrary to the EPA's interpretation of its corrective action authority." *United States v. Indiana Woodtreating Corp.*, 686 F. Supp. 218, 223 (S.D. Ind. 1988).

[33] This argument appears in the Petition in footnote 4 on page 9. Despite the fact that this argument is presented in a footnote, it is in fact one of GMC's chief arguments, as GMC makes clear in its reply memorandum. GMC Reply at 12. GMC states therein that RCRA section 7003 and CERCLA are the remedies to which EPA is relegated in this matter.

[34] There are differences in purpose between RCRA and CERCLA. As a general rule, RCRA is a statute regulating operating industrial facilities, attempting to provide protection to commerce and the public by the regulation of how hazardous wastes are generated, transported, treated, stored, and disposed of on an ongoing basis. CERCLA, on the other hand, is a remedial statute primarily aimed at cleaning up hazardous wastes that are left at defunct operations, or at locations no longer in business. *See United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1269-71 (3d Cir. 1993).

The court noted, in *Apache Powder Co. v. United States*, 968 F.2d 66, 68 (D.C. Cir. 1992), EPA's policy of not listing under CERCLA sites that could be addressed under RCRA Subtitle C corrective action authorities. This policy is responsive to the legislative history of the HSWA,

Continued

ators. GMC admits that it intends to remain active at the facility in the future. GMC Petition at 39. As for RCRA sections 3013 and 7003, we find no error in the Region's decision not to rely on those provisions in lieu of issuance of the Permit. When it comes to choosing among legally permissible remedies for addressing environmental problems, the choice is fundamentally a matter of the Agency exercising its own discretion and therefore is not subject to second-guessing by the owner or operator of the facility that is targeted for corrective action.[35] The Region was concerned that if it did not act quickly and issue the Permit before the 1990 permit "expired," then there might be a lapse in its authority to regulate the facility through the RCRA/HSWA permit process. Region's Response at 13, 23. The Region's election to issue a timely permit modification was a reasonable and permissible choice under the well-established principles of prosecutorial discretion. The Region had no obligation to use one of its RCRA enforcement options.

*Reliance Upon Proposed Regulations.* GMC asserts that the Region must be relying upon the proposed amendments to 40 C.F.R. Parts 264, 265, 270 and 271, which among other things would create

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wherein the House committee said that it wanted the hazardous constituents of SWMUs cleaned up so that sites are:

> not added to the future burdens of the Superfund program * * *. The responsibility to control such releases lies with the facility owner and operator and should not be shifted to the Superfund program, particularly when a final permit has been requested by the facility.

H.R. Rep. No. 198, 98th Cong., 1st Sess. 61 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5620. That one of the purposes of the HSWA was to relieve burdens on the Superfund has been accepted as a correct statement of the law. *See United Technologies Corp. v. EPA*, 821 F.2d at 722. Thus, in passing the HSWA, Congress attempted to require that ongoing operations that released hazardous substances should pay their way, without burdening the CERCLA process designed to ensure the cleaning up of defunct sites. This was to be accomplished through a requirement that ongoing operations obtain permits conditioned upon performance of corrective action. GMC accepted this arrangement when it applied for and obtained its 1990 permit.

[35] We would also point out that the rule in American law is that investigation and prosecution by federal agencies are discretionary functions. *See Heckler v. Chaney*, 470 U.S. 821, 828-32 (1985). Decisions on prosecutorial strategy are a means by which agencies develop their enforcement policies and priorities in light of congressional goals and their areas of responsibility. *See Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-414 (1958). Enforcement discretion also affects the vast governmental responsibility and authority which must be administered by an executive branch with finite resources. *See Council of the Blind of Del. Cty Valley v. Regan*, 709 F.2d 1521, 1529-1530 (D.C. Cir. 1983) (*en banc*); *City of Seabrook v. Costle*, 659 F.2d 1371, 1375 (5th Cir. 1981).

a new Subpart S to Part 264, and which proposed regulations appear at 55 Fed. Reg. 30,798, 30,846 (July 27, 1990), but which were never made final.[36] Thus, says GMC, the Region improperly relied upon mere policy, not regulations. GMC Petition at 9-10, reiterated in a different form at 13-14. Indeed, we have said several times that the proposed Subpart S regulations are not yet final and are only guidance. *See In re Environmental Waste Control, Inc.*, 5 E.A.D. 264, 272-273 (EAB 1994); *Allied-Signal*, 4 E.A.D. at 760.[37] However, GMC is in error as to its conclusion as to proposed Subpart S. We have said that until the Subpart S regulations become final, EPA's authority to issue corrective action requirements rests upon RCRA section 3004 and upon 40 C.F.R. § 264.101. *Id*.[38] The Region's Permit does not rest upon mere policy in the form of unpromulgated regulations.[39]

F. *Objections to Terms Appearing in the 1990 Permit*

As an initial matter, GMC appears to challenge some conditions of the Permit, *i.e.*, those which first appeared in the preexisting, unmodified 1990 permit and which are basically untouched or unaffected by the modifications, as if the Permit were a completely new document. As we have shown above, however, the Permit is a permit modification, not a completely new permit. Because the Permit is only a permit modification, GMC may not seek independent review in this proceeding of conditions that are unaffected by modifications to the

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[36] The Agency has promulgated regulations for a limited, special category of "corrective action management units," which were referenced in the proposal made on July 2, 1990. *See* 58 Fed. Reg. 8658 *et seq.* (Feb. 16, 1993).

[37] In fact, we stated in *Allied-Signal*, at 760, that EPA must be prepared to defend any challenge to its reliance upon proposed Subpart S in fashioning permit conditions on a case-by-case basis. GMC has asserted that the entire Permit rests upon the proposed regulations, particularly as to the definition of SWMU. However, as we show in Part III.G.4.a, *infra*, this is an error.

[38] GMC also asserts that the preamble to the proposed rule says that EPA lacks authority, after the hazardous waste units at a facility are closed, to require facilities to maintain permits until corrective action obligations have been completed. GMC Petition at 9-10. To the contrary, the proposed regulation states, without qualification as to whether or not there are active or closed units at a facility, that "the Agency believes that it already has the authority to modify permits in this situation [*i.e.*, receipt of new information about new releases or new SWMUs] under § 270.41(a)(2), which allows it to modify permits when new information justifies the application of different permit conditions." 55 Fed. Reg. at 30,850; *See also* 58 Fed. Reg. 8658, 8676 (Feb. 16, 1993).

[39] A description of EPA's statutory and regulatory corrective action authority is set out in Part III.B, *supra*.

1990 permit.[40] *See* 40 C.F.R. § 270.41 ("When a permit is modified, only the conditions subject to modification are reopened."); 40 C.F.R. § 124.5(c)(2) ("only those conditions to be modified shall be reopened when a new draft permit is prepared"); *In re Waste Technologies Industries*, 4 E.A.D. 106, 116 n.16 (EAB 1992) ("objections to the [original permit] determination are outside the scope of the instant permit modification determination * * *"). GMC will have to proceed under 40 C.F.R. § 270.42 (modification by permittee) if it wishes modification of any terms which appeared in the preexisting 1990 permit, and which reappear in the Permit, but are unaffected by the modifications.[41]

GMC's objections to the Permit's "standard conditions," (*see* Petition at 16-27), for the most part belong to the category of matters just described. The standard conditions, with minor changes, first appeared in the 1990 permit and now reappear in the Permit. Any differences in those conditions between the two permit versions do not warrant review, for to do so would be tantamount to reopening the terms of the 1990 permit despite the fact that the conditions, with few exceptions, have not undergone any material modification from one version to the next.[42]

GMC points to *In re General Electric Company*, 4 E.A.D. 358, 385-388 (EAB 1992), which holds that EPA is barred, in a split permit situation, from incorporating standard permit conditions wholesale into the federal corrective action permit without first ensuring that such conditions are compatible with, or tailored specifically for, the corrective action permit. Because similar such conditions already appear in the State RCRA permit, including them in the federal permit may be unnecessarily duplicative as well as possibly ill-suited for a corrective action permit. While these points are well taken as a general matter, GMC may not raise these challenges now for the reasons explained in the previous paragraph. Both the 1990 permit and the Permit contain corrective action requirements, and both contain the same basic stan-

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[40] The Region allows that preexisting conditions can be reviewed in a permit modification where the claim is that the permit's modifications change circumstances such that the preexisting permit conditions have a significantly different effect. Region's Response at 29 n.3. However, GMC makes no such claim here, resting its case entirely upon the assertion that the Permit is not a valid modification but is an entirely new document, a claim which we have rejected.

[41] We note that the Region has agreed to several changes to preexisting permit conditions.

[42] To the extent any arguably material modifications are present, the basis for not reviewing such modifications should be apparent to the reader from the discussion elsewhere in this decision or, alternatively, the issues raised for review are not important enough to warrant separate discussion.

dard permit conditions; therefore, there does not appear to be any significant difference in the *status quo ante* as to justify GMC's raising generic objections to the inclusion of standard permit conditions in the Permit. Moreover, as noted in *General Electric Company*, the Region is free, pursuant to 40 C.F.R. § 264.101, to include the standard conditions in a corrective action permit if appropriate adjustments are made to "reflect their intended application to corrective action activities * * *." *Id.* at 387. The Region has represented that it did precisely that in this situation.[43] Region's Response at 29. In fact, in one instance, involving the "inspection and entry" standard condition,[44] the Region has agreed to a voluntary remand to add a provision to the condition so as to provide for split samples and copies of analytical results.

Lastly, we think it is worth noting that even more deference to the Region's decision to include standard conditions in this permit is warranted in the circumstances presented here, since unlike *General Electric Company* there is no longer an underlying State RCRA permit containing standard conditions. The need for standard conditions in the federal permit is obviously more compelling in such circumstances, since they fill a gap created by the absence of a State permit; also, there is no risk of unnecessary duplication.

G. *Specific Challenges to Specific New Permit Conditions*[45]

1. *Impact of Future Regulations*

GMC wants the Region to commit, in the Permit, that it will not oppose a GMC request to modify the Permit to make corrective action duties consistent with new regulations when they are issued. GMC Petition at 28. The Region responded that when new corrective action regulations are promulgated GMC may submit a permit modification

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[43] GMC's objections to the changes the Region did make are all based on GMC's theory—rejected earlier—that EPA has no authority to issue a corrective-action-only permit. Therefore, to the extent that these general conditions have been changed, and are potentially appealable for that reason, we have already addressed GMC's contention and rejected it. Accordingly, any discussion of the individual conditions is unnecessary.

[44] Standard Condition I.D.8.

[45] As noted earlier, EPA has not yet promulgated final regulations addressing corrective action, having only issued regulations in proposed form (the proposed Subpart S regulations). Permit Condition II is the corrective action portion of the Permit. We have addressed above the merits of GMC's generic challenges to all of Permit Condition II's corrective action provisions, including the legal status of the Agency's reliance on the Subpart S proposed regulations.

request under 40 C.F.R. § 270.42. GMC argues that 40 C.F.R. § 270.42 is not sufficiently clear to protect it. We have held that demands for a Region's advance commitment to acquiesce to future permit modifications based upon future changes in statutes or regulations are too speculative to warrant review. *See In re Environmental Waste Control, Inc.*, 5 E.A.D. at 275.

2. *Voluntary Corrective Action*

GMC notes that it is EPA policy to encourage voluntary corrective action. GMC Petition at 29.[46] From this, GMC argues for a specific permit condition to the effect that GMC can select voluntary action, in lieu of the specific corrective action requirements in the Permit, if GMC's actions "are consistent with corrective action requirements," and that any compliance schedules at SWMUs "terminate upon a determination that adequate remediation has been performed." *Id*. GMC seeks, through such a binding permit condition, to avoid being subject to an RFI, and also to place the burden on the Region to set out written explanations for any rejection it may make of GMC's work. The Region responds that it is willing to consider GMC's work and to credit it where appropriate, but points out that nothing in guidance or the regulations compels the Agency to place a binding commitment to voluntary corrective action in the permit.

Clearly the Region need not accept a permittee's finding that its corrective action is sufficient. We have held, for example, that the Region need not accept a permittee's sampling efforts. *In re General Motors Corporation*, 5 E.A.D. 400, 404 (EAB 1994). Even in the area of corrective action performed under State auspices, we have repeatedly held that the Region is required to consider those efforts in determining whether satisfactory corrective action have been taken, but is

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[46] GMC cites the proposed Subpart S regulation for this proposition, but the regulation itself does not support requiring inclusion of a permit provision committing the Agency to approving a particular owner/operator-initiated corrective action measure. As explained by the Region,

> The reason is clear: U.S. EPA should be able to determine, on a facility-by-facility basis, whether actively to encourage owner-initiated cleanup. Yet the mere decision [by the Agency] not to commit to such an agenda in a particular permit does not afford a basis for review. The issue is committed to the Agency's discretion, and if it appears that a facility should be encouraged to engage in a voluntary scheme, this can be effected through subsequent modification.

Region's Response at 44.

not bound to accept them as sufficient. *See In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 144, 171 n.25 (EAB 1995); *In re General Motors Corporation*, 5 E.A.D. at 403; *In re Allied-Signal Inc.*, 5 E.A.D. at 296; *In re Environmental Waste Control, Inc.*, 5 E.A.D. at 275; *In re Metalworking Lubricants Company*, 5 E.A.D. 181, 185 (EAB 1994). If the Region is not bound to accept, as satisfaction of HSWA requirements, corrective action taken under State supervision, the Region surely may examine into unsupervised corrective action taken voluntarily by a permittee.

The issue then comes down to whether the Region must include a permit condition requiring some form of written explanation for its rejection of any self-initiated work done by GMC. We are not pointed by GMC to any regulation making such a requirement. In the absence of a binding obligation on the Region to include such a requirement, we decline to second-guess its exercise of discretion in this matter.

3. *Conditional Remedies*

GMC argues that the Permit should provide specifically that conditional remedies will be allowed, or at least considered. GMC Petition at 30.[47] GMC says that this is particularly appropriate because GMC's plant is so large that GMC can be expected to maintain a long term presence, because the contaminants and releases are no current threat, and because the releases are remote from "potential receptors" and can be reliably controlled. *Id*. The problem with this approach is that it is very speculative, there being little relevant record evidence. There are only limited investigations by GMC, which the Region found were not enough to support a conclusion that conditional remedies were appropriate. GMC does not attempt to rebut the Region's conclusion that there is insufficient information. Also, GMC has leased a major portion of the facility to another company and argues that it has therefore lost control of much of the facility.[48] In the circumstances, the Region did not clearly err in waiting for a more specific factual context before passing on conditional remedies. *See In re General Motors Corporation*, 5 E.A.D. at 403 n.4 (the Region may await site-

[47] By conditional remedy, GMC means allowing existing contamination to remain at a facility, subject to certain conditions such as controlling contaminant migration, citing the proposed Subpart S regulations, 55 Fed. Reg. at 30,833.

[48] This fact seriously undercuts the practical value of GMC's representation, noted above, that it can be expected to maintain a long-term presence. As discussed in section 4.e., *infra*, GMC argues that it should not be held responsible for the portion of the Plant leased to DRA, Inc.

specific facts before before making a decision on corrective action).[49] Moreover, the Region has indicated its willingness to revisit the issue when the administrative record is sufficient to justify doing so. Region's Response at 47. Therefore, there is no compelling reason for the Board to review the Region's refusal to include a conditional-remedies provision in the Permit.

4. *Identification of SWMUs*

a. *Comments Applicable to all SWMUs*

GMC first complains that EPA has never issued rules defining SWMUs, even though it has used the term for over ten years, and that therefore there is no basis for the Region's conclusion that any area is a SWMU. GMC continues on to conclude that "all alleged SWMUs should be deleted from the Permit." The statute involved here, RCRA section 3004(u), expressly uses the term "solid waste management unit."[50] GMC Petition at 31. The notion that a statutory provision is rendered nugatory because the agency implementing the Act has not defined one of the terms in it does not pass the straight-face test. Remarkably, GMC is not the only person to have raised this claim.[51] We previously rejected this argument in *Environmental Waste Control*, 5 E.A.D. at 277, and *In re GSX Services* 4 E.A.D. 451, 454-45 (EAB 1992). *See also In re Exxon Co., U.S.A.*, 6 E.A.D. 32, 45 (EAB 1995).

b. *Secondary Containment for 300,000 Gallon Above Ground Fuel Tank Outside of Plant 20 (SWMU No. 28)*

GMC objects to the Region's decision to define this part of the facility in the Permit as a SWMU. GMC argues that the area is not a SWMU because, according to GMC, there were no "routine and sys-

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[49] GMC relies upon *In re Amoco Oil Company*, 4 E.A.D. 954, 962-63 (EAB 1993) for its argument on conditional remedies. However, *Amoco Oil* was decided on the Region's failure to provide a record and a proper analysis. Here, GMC has failed to produce needed information, and the Region's analysis is clear.

[50] The statutory term is not ambiguous. We have previously said, addressing the meaning of RCRA section 3004(u), that "[i]t is axiomatic that the term 'solid waste management unit' refers to any unit used for the management of solid waste." *See In re B.F. Goodrich, Company*, 3 E.A.D. 483, 486 n.7 (EAB 1990).

[51] Even more remarkably, GMC was the petitioner in a case wherein we explored and explained the meaning of the term SWMU in detail. *See General Motors Corp.*, 4 E.A.D. 334, 336-39 (EAB 1992).

tematic releases" from it, because the "unit is a product storage tank," and because the record fails to indicate that any releases from the area warrant corrective action. GMC Petition at 32-33.

SWMU #28 is a secondary containment area for a 300,000 gallon above-ground fuel storage tank outside of Plant 20. Information available to the Region indicated that a spill of 2,000 gallons of "material" occurred at some time in the past, which was cleaned up in some fashion in 1978. Eleven years later additional responsive measures were taken at this location, but the record does not show what prompted these additional measures. The site is a refueling area where coupling and uncoupling operations take place incident to refueling activities. According to the parties, there is a container in place under the tank's fill pipe to collect spills from the coupling and uncoupling operations. The parties attach different significance to these facts.

GMC takes the position that to be a SWMU there must be evidence of routine and systematic releases, and it asserts that the facts do not support such a conclusion in this instance; according to GMC, there is only evidence of the one isolated incident of a 2,000-gallon spill in 1978. The Region on the other hand does not dispute the necessity of having evidence that routine and systematic spills occurred at the site to qualify it for SWMU status; rather, it takes the position that the evidence is present in this case, and further, that the evidence need not be conclusive before further corrective action is required.

Neither the statute nor any promulgated final regulations define a SWMU. The term SWMU is found in the text of RCRA section 3004(u), which mandates corrective action for releases of hazardous waste or constituents from any "solid waste management unit" at a RCRA treatment, storage, or disposal facility. Despite the absence of a separate definition for SWMU, all of the words that make up the term are defined. The terms "solid waste management," RCRA section 1004(28), 42 U.S.C. § 6903(28), and "unit," *see* 47 Fed. Reg. 32,289 (July 26, 1982), are both defined. Based on their definitions, we have ruled that 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 GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 454-55 (EAB 1992) (quoting *In re Morton International, Inc. (Moss Point, Mississippi)*, 3 E.A.D. 857, 859 (Adm'r 1992)).

A definition of SWMU appears in the proposed Subpart S regulations, and GMC's reference to "routine and systematic" releases is

drawn from that proposal, which defines the term SWMU as:

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

55 Fed. Reg. at 30,808 (emphasis added). We have sustained the use of permit provisions on several occasions that either employ or are based on this definition. *See, e.g., Exxon Co., U.S.A.*, 6 E.A.D. at 46; *GSX Services*, 4 E.A.D. at 454-55. Therefore, we accept, as does the Region, GMC's contention that the record must reflect evidence of routine and systematic releases for SWMU #28 to be properly classified as a solid waste management unit. The question then becomes one of determining whether the record supports classifying the SWMU #28 as a solid waste management unit.

GMC emphasizes the fact that there is only one documented spill, which, if this were the only pertinent consideration, might well prove its point that the site in question is not really a SWMU. *In re American Cyanamid Co.*, 3 E.A.D. 45 (Adm'r 1989) ("a one-time, accidental spill of raw material does not create a SWMU. *See* 50 Fed. Reg. 28712-13 (July 15, 1985)"). The Region, however, takes a broader look at the facts and concludes that for purposes of SWMU classification there is circumstantial evidence supporting its position that releases may have taken place on a routine and systematic basis. Several elements combine to buttress the Region's suspicions. First, the activity at this site involves refueling operations. It is not unreasonable to expect some spills to occur in the course of refueling, since fuel tanks are well known sources of releases of hazardous substances or hazardous constituents. In fact, we have squarely held that a tank, especially a fuel tank, may be a SWMU. *See Exxon Co., U.S.A.*, 6 E.A.D. at 37-38 (separator tanks); *Environmental Waste Control*, 5 E.A.D. at 277-80 (diesel fuel tanks). Second, there is the documented spill in 1978. Third, there is the documented fact that additional, more extensive remedial work took place eleven years later at the same site. This length of time suggests the possibility of additional releases, rather than simple procrastination in completing a previously unfinished task. *Cf.* 55 Fed. Reg. at 30, 808-09 (coupling and decoupling activities at a loading area might result in steady drippage over time and heavily contaminated soils). Fourth, the fact that there is at present a separate container placed under the fill pipe to catch spills from coupling and decoupling operations is not a basis for assuming, as GMC suggests, that any

spills were contained and never resulted in releases to the environment. That assumption is not substantiated in the record because the record does not reflect when the container was placed under the pipe. If anything, the presence of the container substantiates the fact that spills are routine and are likely to have occurred in the past. In our view, the Region's analysis of the facts supports its conclusion that SWMU #28 satisfies the routine and systematic criterion.

In deciding whether an area is a SWMU it must be kept in mind that conclusive proof of routine and systematic releases is not required. Imposition of corrective action requirements is typically done in separate phases over varying periods of time. The decision to proceed from one step to the next depends in part on the quantity and quality of information gathered in a previous step. Obviously, in seeking to discover if significant contamination has occurred and, if so, its extent, less is known at the beginning stages than at the end; consequently, decisions that are made during the earlier stages may reflect the relative lack of hard facts that one otherwise comes to expect near the end of the corrective action process. We have therefore held that the early stages of corrective action, especially the initial identification of a SWMU, need not be based on irrefutable proof but can instead be grounded on reasonable suspicions. "It is well settled that the Agency need not definitively establish that a release has occurred before imposing corrective action requirements. Rather, the Agency may impose such requirements where it suspects a release or determines that a release is likely to have occurred." *GSX Services,* 4 E.A.D. at 456. "The RCRA corrective action authority is not limited to known or detected releases, but also extends to likely or suspected releases." *In re American Cyanamid Co.,* 3 E.A.D. 657, 665 n.28 (Adm'r 1991). "To require an owner/operator to conduct further investigation of a SWMU, the Region need not have conclusive evidence of a release, but instead only evidence of a likely or suspected release." *In re Shell Oil Co.,* 3 E.A.D. 116, 119 (Adm'r 1990). *See also W.R. Grace & Co.*, 959 F.2d 360, 361 (1st Cir. 1992) (holding that EPA may order corrective action based upon reasonable suspicion of a release). This approach of not demanding conclusive evidence is necessitated by the fact that detecting subsurface contamination must proceed incrementally, in steps, often beginning with very incomplete information; thus, the quantum of evidence needed for the initial classification of an area as a SWMU must necessarily make allowances for uncertainties associated with locating hidden, subterranean releases.[52]

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[52] Moreover, after the initial identification of a SWMU in a permit, "[i]f it should become apparent that no release of hazardous waste or constituents has occurred, there would then be no basis for proceeding to require corrective action under Section 3004(u)." *In re General Motors*
continued

We next turn to GMC's contention that the classification of SWMU #28 was in error because, as GMC asserts, the "unit is a product storage tank." GMC Petition at 32. GMC seems to be making two points here, one factual and one legal, with the former a necessary predicate for the latter. The legal argument asserts that the law provides that production process areas are not subject to corrective action; the factual argument asserts that the secondary containment area (which we are assuming defines the precise extent of SWMU #28) is inseparable from the storage tank itself, which is a product storage unit. Because of the inseparability, the unit is actually a production process area and, therefore, as the argument goes, is not subject to corrective action.

The germ of GMC's reasoning on this point is nourished by several statements culled from the Federal Register preamble to the proposed Subpart S regulations. The preamble, as excerpted by GMC, states that the scope of "SWMU" excludes "leakage from a chemical product storage tank" and "releases from production processes, and contamination resulting from such releases, * * * unless the Agency finds that the releases have been routine and systematic in nature." *Id.* (citing 55 Fed. Reg. at 30,809). For the reasons stated below, we do not accept GMC's reliance on these excerpts as reason to conclude that the Region erred.

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*Corporation*, 5 E.A.D. at 407 n.12. In other words, designation of a SWMU for corrective action in a permit does not mean that extensive remedial action will be required in the face of evidence demonstrating that none is actually necessary. This concept is memorialized in Permit condition II.F.2.a., which allows GMC to seek modification of the Permit to terminate further corrective action whenever it is established that there are no releases of hazardous wastes or hazardous constituents from a SWMU that pose a threat to human health and the environment.

In this particular instance, the Region gives the following narrative explanation, in its Response to Comments accompanying the Permit Modification, of the steps that GMC should be expected to follow in implementing the corrective action requirements for SWMU #28:

> Because there may have been releases of a routine and systematic nature at this unit, IDEM properly designated this unit a SWMU. Further sampling is necessary for this area to confirm that the contamination has been removed [pursuant to the 1978 and 1989 cleanups]. In fact, GM proposes to conduct investigations of this area in the Preliminary Workplan submitted to U.S. EPA. U.S. EPA believes that it is most efficient to conduct the investigations under an Agency approved RCRA Facility Investigation Workplan rather than a separate workplan.

Region Response to Petition, Exhibit S at 35.

As explained in *In re BF Goodrich Company, Calvert City, Kentucky*, 3 E.A.D. 483, 485 n. 6 (Adm'r. 1990), there is no *per se* exclusion of production or process areas from the scope of corrective action coverage:

> Although RCRA generally does not apply to production processes that do not involve solid waste management, the routine and systematic discharge or disposal of solid waste from a process area constitutes solid waste management. *See, e.g.*, RCRA § 1004(28), 42 U.S.C.A. § 6903(28) ("The term 'solid waste management' means the systematic administration of activities which provide for the * * * disposal of solid waste.") * * *. [I]t is not the process unit *per se* that is the SWMU in such situations, but the area used for the routine and systematic discharge of solid waste.

The proposed Subpart S regulations, which GMC excerpts, adopt the same view. The preamble to the proposed regulations identifies the following areas, which are plainly production or process areas, as SWMUs:

> [A] loading/unloading area at a facility where coupling and decoupling operations, or other practices result in a relatively small but steady amount of spillage or drippage, that, over time, results in highly contaminated soils.
>
> [A]n outdoor area of a facility * * * used for solvent washing of large parts, with amounts of solvent continually dripping onto the soils, * * * could also be considered a solid waste management unit.

55 Fed. Reg. at 30,808-09. Thus, the preamble clearly supports the notion that production and process areas are not out-of-bounds, but are clearly eligible for SWMU status if there is sufficient reason to believe that releases have occurred in a routine and systematic manner.

The same preamble identifies examples of areas that are not SWMUs, including the examples cited by GMC:

> [L]eakage from a chemical product storage tank would generally not constitute a solid waste management unit; such "passive" leakage would not constitute a routine and systematic release since it is not the result of a systematic human activity.

> Likewise, releases from production processes, and contamination resulting from such releases, will generally not be considered solid waste management units, unless the Agency finds that the releases have been routine and systematic in nature.

*Id*. at 30,809.[53] As can be seen from the product storage tank example, product storage tanks are not *per se* excluded from the scope of SWMU coverage; rather, they are normally excluded if the leak is not the result of systematic human activity. The Region points out that any leakage from SWMU #28, because of the coupling and uncoupling that takes place at the unit, likely involves spills that are the result of human activity, thus distinguishing SWMU #28 from the example cited in the preamble. Similarly, the second example is not a basis for disqualifying SWMU #28, for, as discussed above, there is reason to believe that routine and systematic releases have occurred at the site. Therefore, based on the foregoing examples of SWMUs and non-SWMUs, it can be seen that the Region's decision to require corrective action for SWMU #28, which is comprised of secondary containment unit for GMC's 300,000 gallon above-ground fuel storage tank, was not the product of clear error.

Finally, GMC portrays the Region's treating the secondary containment area as separate from the storage tank as part of a deliberate and impermissible attempt to circumvent restrictions against regulating production related processes or releases. This follows, according to GMC, because the definition of "tank system" in 40 C.F.R. § 260.10 supposedly "states that [it] includes both the tank and its secondary containment." GMC Petition at 32. Actually, as can be seen from the text of the definition, immediately following, the definition has no bearing on the matter before us.

> *Tank system* means a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.

40 C.F.R. § 260.10 (Definitions). Neither the Region nor GMC is contending that the storage tank at SWMU #28 is a tank for hazardous waste storage; both parties clearly recognize that the tank is a product storage tank. Thus, the definition is simply not pertinent to this case; and therefore, there is no merit to GMC's contention that the Region

[53] Following these examples, EPA expressly requested "comment on these interpretations, and on the overall definition of solid waste management unit." 55 Fed. Reg. at 30,809.

has engaged in any alleged impermissible "separation" of the secondary containment unit from the storage tank.

Accordingly, for the reasons stated above, review of the Region's decision to require corrective action at SWMU #28 is denied.[54]

c. *Former Plating Operations Area (SWMU No. 76)*

GMC avers that the EPA fact sheet says that the plating areas may experience significant leakage, but that there is no evidence of any releases in this area. GMC Petition at 34. In its response to GMC's comments on the draft permit, the Region noted, at 36, that in addition to leaking, the plating area also drains into a collection sewer system suspected of leaking, and also that the unit has a cracked concrete floor. GMC has not challenged this response. We believe that the Region had the authority based on these facts to designate the plating operations area as a SWMU. We have held on several occasions that collection sewers may be designated as SWMUs, despite the fact that evidence of leaks may not be immediately apparent. *See, e.g., In re Environmental Waste Control, Inc.*, 5 E.A.D. 264, 283-84 (EAB 1994). In this case, the plating area with its cracked concrete floor is connected to a collection sewer, which the Region concluded suggests the need for further investigation in accordance with the Permit's corrective action procedures for SWMUs. The lack of evidence confirming the integrity of the system as a whole supports the Region's conclusion. *Id.* at 284.[55] Under the circumstances, we see no compelling reason to

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[54] The Region also argues that even if the Board were to conclude that the Region erred in characterizing SWMU #28 as a solid waste management unit, the unit could still be designated for corrective action as an "area of concern" pursuant to the "omnibus" clause in RCRA section 3005(c)(3). Region's Response at 51. While this point is correct as a general proposition, see, for example *In re Morton International, Inc. (Moss Point, Mississippi)*, 3 E.A.D. 857 (Adm'r 1992); *In re American Cyanamid Co.*, 3 E.A.D. 45 (Adm'r 1989), any such designation pursuant to the omnibus authority must be accompanied by a statutory finding that the specified corrective action is "necessary to protect human health and the environment." As we stated in *In re Sandoz Pharmaceuticals Corp.*, 4 E.A.D. 75, 80 (EAB 1992):

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

The Region has not pointed us to any specific finding in this respect; therefore, we need not consider the Region's contention that the unit could also be an area of concern subject to corrective action.

review the Region's decision to include the plating area on the list of SWMUs subject to corrective action under the Permit.

d. *Newly Identified SWMUs or Releases*[56]

GMC objects to being required to notify EPA of any new SWMUs identified at the facility, arguing that because no regulation authorizes such a requirement, and it is inconsistent with the corrective action program which is to address known problems, not to create endless new corrective action. GMC Petition at 35. Alternatively, GMC wishes the Region to clarify this requirement so as to specify that GMC need not report known releases of a nature and kind that EPA has already considered. *Id*. We have previously rejected the argument that the Region may not require a permittee to report new SWMUs. *See In re Exxon Company, U.S.A.*, slip op. at 16-17; *In re Delco Electronics Corporation*, 5 E.A.D. at 479 and n.5; *In re Environmental Waste Control, Inc.*, 5 E.A.D. at 284-85. *See also* 40 C.F.R. § 270.14(d). With respect to GMC's request that the Region clarify the requirement so that GMC need not report known releases of a nature and kind that EPA has already considered, the request in the context of this case appears entirely theoretical. GMC has claimed that it has ceased RCRA hazardous waste operations. It is unclear how GMC might have problems with duplicative *future* discoveries of SWMUs or releases. It is not necessary to cover every eventuality in a RCRA/HSWA permit. *See In re General Motors Corporation*, 5 E.A.D. at 414. Should GMC actually find in the context of a specific factual situation that there is a problem with duplicative reporting requirements, GMC may seek an amendment to the Permit to eliminate the duplication.

e. *Areas Leased to Others*

GMC states that it has leased much of Plants 3 and 17 to DRA, Inc., and that it would therefore be impractical and unreasonable to require GMC to report new SWMUs for areas not under GMC's control. GMC Petition at 36. GMC does not state when it entered into the lease relative to first becoming subject to RCRA's corrective action requirements, nor even if the date of execution of the lease would have had any practical effect on its ability to carry out its responsibilities under RCRA on the leased land. In any event, GMC as owner of

[55] GMC also says that EPA cannot regulate the use of the plating operations area because production units are exempt from RCRA. This is one of the same arguments as GMC made with respect to the fuel tank and is similarly denied.

[56] Permit Condition II.D.

the land has a duty under RCRA to have a permit and to comply with its terms, including performing corrective action. *See In re Waste Technologies Industries, East Liverpool, Ohio*, 4 E.A.D. 106, 109 n.6 ("the landowner [of land subject to a lease] is legally required under RCRA to have a permit [citations omitted]") (EAB 1992). This would include the reporting of newly discovered SWMUs. GMC does not allege that its lease precludes it from carrying out this duty, but only that it is impractical to do so. This assertion is effectively contradicted, however, by its comments on the draft permit, where GMC said that the lessee, DRA, Inc., "would willingly, cooperate with any GMC corrective action activities in areas leased by DRA." GMC Comments at 21. As noted above, a mere theoretical difficulty does not merit review.[57] However, we would also note that the RCRA corrective action duty is mandatory. Mandatory environmental duties cannot be avoided by releasing control of the affected property. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 797 n.29 (EAB 1997).[58] GMC has failed to demonstrate that it cannot and should not report new SWMUs in the leased area. Therefore no review of this issue is appropriate.

### f. *RCRA Facility Investigation*[59]

The Permit requires GMC to carry out an RFA according to a work plan attached to the Permit. GMC asserts that this is contrary to EPA's policy of voluntary corrective action and EAB precedent which says that RCRA corrective action requirements should be site-specific, avoiding unnecessary or inappropriate burdens on the permittee. GMC Petition at 36. GMC also says that it incurred expense in preparing and sending to EPA a preliminary RFI Sampling and Analysis Plan to use in an RFI in lieu of the generic model. *Id*. We have discussed the matter of voluntary action above. The Region need only take the efforts into account. As to site-specific concerns and undue burdens, GMC does not set out any facts to support this concern. As noted above, we do not review theoretical objections.

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[57] GMC does not provide any information about agreements, or efforts at agreement, such that DRA, Inc. would undertake to report new SWMUs. This makes GMC's argument rather abstract. For example, we cannot tell whether DRA, Inc. has become an additional statutory operator at the facility. *See In re Waste Technologies Industries*, 5 E.A.D. 646, 648-49 (EAB 1995).

[58] Citing *Italia Society Per Azioni Di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 317 n.3 (1964); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 211-12 (1963) (duty to maintain seaworthiness remains, even if control of ship is released to others).

[59] Permit condition II.F.1.

GMC also claims a violation of its due process rights because the condition would allow the Region to revise (or force GMC to revise) interim corrective action submissions without meeting RCRA permit modification rules or an appropriate dispute resolution provision. *Id*. We have rejected this argument in the past because it is factually and legally incorrect. *See In re General Motors Corporation*, 5 E.A.D. at 411-12; *In re General Electric Company*, 4 E.A.D. at 626-27. Should the Region provide or require revisions to interim corrective action submissions, GMC's rights will depend upon the circumstances and contents of those revisions. *Id*. It would be too speculative for us to address possible problems in the abstract.[60] Neither will we presume in advance that the Region will not honor GMC's rights should a problem arise.[61]

### g. *Determination of No Further Action*[62]

The challenged Permit condition allows GM, after completion of and based on the results of the RFI and other information, to submit a "Class 3" modification request if it believes that no further corrective action at any SWMU is required. GMC wants EPA to supplement this provision by "specify[ing] the process which will result in an irrefutable conclusion that no further action is required for all media for which the Permit Modification requires corrective action." The Region indicated a willingness to pursue the matter, *e.g.*, by considering a future GMC request to modify the Permit, and requested a specific industrial scenario for future facility use, to be considered in connection with its decision on the need for corrective measures. GMC has instead kept its request phrased in general terms. In any event, the Region cannot now "commit" to how it would deal with a hypothetical future Class 3 modification request, particularly since any such request would be subject to a requirement for public notice and comment. 40

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[60] For similar reasons we decline to review GMC's assertion that Attachment I to the Permit (Corrective Action Scope of Work) should be altered because its language appears mandatory, even though the Region has said that it is only a model. GMC Petition at 42. We have previously held that such a situation does not merit formal review. We take the Region at its word. *See In re Allied-Signal, Inc. (Frankford Plant)*, 4 E.A.D. 748, 764-65 (EAB 1993).

[61] Courts will also refuse to assume in advance that federal agencies will not follow legal requirements. *See Perkins v. Matthews*, 400 U.S. 379, 394 (1971); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *First National Bank of Albuquerque v. Albright*, 208 U.S. 548, 553 (1908).

[62] Permit condition II.F.2.

C.F.R. § 270.42(c). Therefore, GMC has articulated no basis that would warrant review of this issue. [63, 64]

h. *Continued Monitoring*

GMC objects to Permit condition II.F.2.b as allowing EPA to require continued or periodic monitoring of air, soil, groundwater, or surface water, without the Region's having to go through permit modification procedures or an appropriate dispute resolution procedure prior to requiring such — allegedly in violation of GMC's due process rights. GMC Petition at 38. Actually, the Permit provision is silent on what procedures the Region may or may not be required to follow under the Permit before imposing further monitoring. Nevertheless, the Region indicated in its response to comments on the draft Permit that it was adding a dispute resolution provision to the Permit for the express purpose of addressing, *inter alia*, GMC's due process concerns if the Region were to require periodic monitoring. Region Response to Comments at 39. Therefore, until an actual controversy arises under this monitoring provision, there is no basis for assuming that the procedures the Region will follow will not include adequate safeguards for GMC's due process rights under the Permit. Furthermore, since this particular monitoring provision only applies to units that have been previously determined to require no further corrective action (as provided in Permit condition II.F.2.a., discussed immediately above), we assume that this provision will not be invoked with much frequency or, at least, without substantial indications, *inter alia*, that further monitoring is actually necessary. As provided in the provision at issue, monitoring will only be required "when site-specific circumstances indicate that potential or actual releases of hazardous waste(s) or hazardous constituents are likely to occur." Based on the foregoing considerations, we see no compelling reason to review this provision.

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[63] It is also possible that the Region cannot "irrefutably" release future corrective action requirements, no matter what the Region's view of the facts. RCRA requires corrective action. That requirement might mandate corrective action, based on newly discovered information or subsequent analysis (Permit condition II.F.2.c.).

[64] GMC also wants a final release from further corrective action to be granted when it does site-specific risk assessment finding "constituent levels below which no substantial threat to human health and the environment will occur, assuming continued use of the Plant for industrial purposes." GMC Petition at 37. We have previously discussed GMC's demands relating to the responses that the Region may be called upon to make to GMC's work at the facility.

### i. *Corrective Measures Study*[65]

If the Region determines from the RFI and other relevant information that corrective measures are necessary, then GMC must conduct a "corrective measures study" ("CMS"). GMC wants the relevant Permit condition to provide that a CMS will be required only if necessary to protect human health or the environment, based on site-specific assessments done by GMC. GMC Petition at 39.[66] We have rejected the claim that a Permit must include specific language limiting corrective action to those needed to protect human health or the environment. While a permit may not affirmatively misstate the limits of the Region's authority, express use of language limiting corrective action to those needed to protect human health or the environment is not necessary. *See In re General Motors Corporation*, 5 E.A.D. at 414.[67]

GMC also wants a Corrective Measures Study Plan ("CMSP") to be required only after the final RFI has been approved under Condition II.F.1.c., *i.e.*, only after the Region has completed its review of the final RFI "and determined that, given the nature of any releases and any resulting contamination, corrective measures are appropriate for specific SWMUs." GMC Petition at 39. The Region has agreed to a voluntary remand on this issue, and will incorporate language into the Permit consistent with *In re Amoco Oil Company*, 4 E.A.D. 954, 968-970 (EAB 1993).

### j. *Corrective Measures Implementation*[68]

GMC wants an express provision that corrective measures may only be required to protect human health or the environment, as determined by a site-specific risk assessment conducted by GMC. GMC Petition at 40. Also, GMC wants the Permit to take into account current and anticipated continued industrial use and long term reliability of institutional controls. We have rejected these restated claims above.

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[65] Permit condition II.F.3.

[66] GMC also reiterates its claim of violation of a due process right because the Region could revise, or require GMC to revise, interim corrective action submissions without RCRA permit modification rules or dispute resolution provisions. As noted above, this is incorrect.

[67] The Region has in fact stated that it will not require corrective action unless needed to protect human health or the environment. Region's Response at 56-57.

[68] Permit condition II.F.4.

k. *Dispute Resolution*[69]

GMC asserted in its comment letter that the draft permit modification would have allowed the Region to revise, or require GMC to revise, interim submittals during the corrective action process "without complying with the applicable RCRA permit modification rules (40 C.F.R. Parts 124 and 270) and without an opportunity for an administrative appeal." GMC Petition at 41. The Region amended the dispute resolution portion of the draft permit modification in response to this comment. *Id*. However, GMC claims that the dispute resolution provision is still inadequate in that it fails to provide for a meeting between GMC and the Region's Director, Waste, Pesticides and Toxics Division, who is the decision-maker in the dispute resolution process, before that Director makes a final decision. *Id*. We have made it clear that the dispute resolution process need not provide for a direct meeting with the final dispute resolution decision-maker, but only with the permitting staff. *See Exxon Co., U.S.A.*, 6 E.A.D. at 44-45; *Delco Elec. Corp.*, 5 E.A.D. at 484-86; *General Motors*, 5 E.A.D. at 411; *General Electric Company*, 4 E.A.D. at 639. The Permit's dispute resolution provision is satisfactory.[70]

## **IV**. *CONCLUSION*

The Permit is remanded to Region V for the agreed-upon revision of Permit conditions I.D.8. (inspection and entry) and II.F.1.c (corrective measures study).[71] In all other respects, GMC's petition for review is denied.

So ordered.

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[69] Permit condition II.G.

[70] GMC asserts that references in Permit conditions II.G.1 and 2 to any submission required by "Condition II.C" appear to be typographic errors, and should be replaced with "Condition II.F." GMC Petition at 41. The Region has not challenged this. If the assertion is correct the Region can make the correction on the remand.

[71] 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 significant new light on the issues addressed on remand. Also, because of the limited nature of the remand, it will not be necessary for this Board to pass upon the Permit again after the Region has made the specified changes.