ARGUMENT HELD APRIL 24, 2001
DECISION ISSUED JULY 24, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CEMENT KILN RECYCLING COALITION, et al.,	)	
Petitioners,	)	
v.	)	
ENVIRONMENTAL PROTECTION AGENCY and CHRISTINE TODD WHITMAN, Administrator,	)	No. 99-1457 and consolidated cases
Respondents.	)	

JOINT MOTION OF ALL PARTIES FOR STAY OF ISSUANCE OF MANDATE

All Parties to the above action jointly move the Court to stay the mandate in the above-referenced case until February 14, 2002 to allow EPA to develop interim air emission standards for hazardous waste combustion sources. These interim standards would temporarily replace the standards vacated by the Court in its decision of July 24, 2001.

A description of the actions EPA intends to undertake is included as an Attachment to this Joint Motion. To ensure that EPA completes the "Permanent Replacement Standards Rule" by June 14, 2005, as indicated in the Attachment, EPA and Sierra Club intend (after completing the notice and comment process required by section 113(g) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(g)), to enter into a settlement agreement embodying that commitment. EPA and Sierra Club then will file a joint motion with the Court requesting that the Court enter an Order requiring EPA to promulgate

final regulations complying with the Court's opinion no later than June 14, 2005. All parties support all of the EPA actions recited in the Attachment. Industry Parties also do not oppose entry of a June 14, 2005 deadline that is judicially enforceable by Sierra Club.

The Parties request the Court to stay issuance of the mandate in order to prevent a situation where there are no national CAA standards for hazardous air pollutants emitted by hazardous waste combustors. Establishing national CAA section 112(d) standards is consistent with Congressional intent. The Parties further request the stay to prevent the adverse effects and burdens to regulated industry, States, and EPA resulting from application of the so-called "hammer" provision of CAA section 112(j)(2), 42 U.S.C. § 7412(j)(2), which, in the view of Respondent EPA, applies if there are no national standards in place.[1] The Parties believe this approach will best fulfill the Congressional requirement to have national emission standards in place by a specified time, while avoiding unnecessary disruption and burden to regulated industry and affected state and federal administrative agencies.

This motion explains the need for the Court to stay the issuance of its mandate, and explains the actions EPA expects to undertake if the mandate is stayed until February 14, 2002. Parties other than EPA enter into this Motion on the express understanding that EPA will carry out these undertakings, and retain their right to seek additional relief if EPA fails to do so.

[1] As explained below, the Industry Parties do not necessarily agree with EPA's interpretation of the so-called "hammer" provision. However, as explained in note 3, infra, Industry Parties agree that failure to stay issuance of the mandate could lead to adverse consequences.

I. BACKGROUND

A. Statutory Background. As explained in the Court's opinion, Congress amended the Clean Air Act in 1990 to require that hazardous air pollutants be controlled by technology-based standards that require "the maximum degree of reduction in emissions of . . . hazardous air pollutants . . . that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources." 42 U.S.C. § 7412(d)(2). Further controls are required later if significant risk remains after imposition of the technology-based standards. See generally Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 857-58 (D.C. Cir. 2001). The statute also specifies certain automatic consequences in the event EPA fails to promulgate a standard for a source category. Section 112(j) of the Act, 42 U.S.C. § 7412(j), provides generally that major sources[2] for which standards are not promulgated must submit permit applications by given dates, and that federal or state permit writers must then determine on a case-by-case basis a technology-based standard equivalent to that which would have been in the national rule for that source category. Similarly, section 112(g)(2)(B) prohibits the operation of a new or reconstructed major source unless it receives a permit containing limitations equivalent to the maximum achievable control technology for new sources in that source category. 42 U.S.C. § 7412(g)(2)(B). These case-by-case standards can be superseded by later national rules, but if case-by-case standards are already incorporated in a source's permit, permit writers have some discretion as to

[2] A "major source" is a source with the potential to emit 10 tons per year or more of any single hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

when the permit must be amended to reflect the national standard, as well as some discretion in establishing a compliance date for the national standard.

B. The Hazardous Waste Combustor Rule. The rule at issue established emission CAA section 112(d) standards for incinerators, cement kilns, and lightweight aggregate kilns that burn hazardous waste. 64 Fed. Reg. 52,828 (Sept. 30, 1999). The rule regulates emissions of numerous hazardous air pollutants: dioxins, other toxic organics (through surrogates), mercury, other toxic metals (both directly and through a surrogate), hydrogen chloride and total chlorine.

C. The Court's Opinion. The Court held that EPA had not demonstrated that the standards met the statutory requirement of being no less stringent than (1) the average emission limitation achieved by the best performing 12 percent of existing sources and (2) the emission control achieved in practice by the best controlled similar source for new sources . 255 F.3d at 861, 865-66. As a remedy, the Court, after declining to rule on most of the issues presented in the Industry petitions for review, vacated the "challenged regulations," stating that: "[W]e have chosen not to reach the bulk of industry petitioners' claims, and leaving the regulations in place during remand would ignore petitioners' potentially meritorious challenges." Id. at 872. Examples of the specific challenges the Court indicated might have merit were to provisions relating to compliance during start up/shut down and malfunction events, including emergency safety vent openings, the dioxin standard for lightweight aggregate kilns, and the semi-volatile metal standard for cement kilns. Id. However, the Court stated, "[b]ecause this decision leaves EPA without standards regulating [hazardous waste combustor] emissions, EPA (or any of the parties to this proceeding) may file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards." Id.

Acting on the Court's invitation, all the Parties to the litigation are filing the present motion. In filing this motion, the Parties are guided by the following objectives: (1) it is not in the public interest, nor in the interest of the Parties, if there is a period where there are no section 112(d) standards for hazardous air pollutant emissions from hazardous waste combustors; (2) it is not in the public interest, nor in the interest of the Parties, for there to be a period where potentially inconsistent, case-by-case permit limits may be developed for hazardous waste combustors; and (3) in crafting a remedy, the claims of both environmental and industry parties need to be addressed.

II. THERE IS GOOD CAUSE FOR STAYING ISSUANCE OF THE MANDATE

Pursuant to Circuit Rule 41(a)(2), the Court may stay issuance of the mandate for "good cause." See also Handbook of Practice and Internal Procedures (2000) at 53. See also Small Lead Refiner Phase-Down Task Force v. EPA, 705 F. 2d 506, 545-46 (D.C. Cir. 1983) (invoking good cause to justify delay in issuing mandate to allow time for agency to promulgate an interim rule to avoid a situation where no regulatory controls over the relevant source existed). The parties explain below why there is good cause for such a stay in this case.

A. Adverse Consequences of Vacating the Rule Before EPA Promulgates a Replacement Rule

The consequence of vacating the present rule before EPA promulgates a replacement rule is that the statutory "hammer" provisions would operate with respect to major sources, and that there would be no CAA regulations at all for area sources.[3] As explained above, Congress

[3] The following discussion of the "hammer" provision and its consequences, including the effect of area sources not being regulated by CAA section 112 standards, reflects EPA's interpretations of the statutory provisions. Industry petitioners do not necessarily concur in EPA's interpretations. Industry petitioners believe, however, that the hammer provisions raise many (continued...)

required that EPA promulgate national standards to control emissions of hazardous air pollutants by designated dates. Congress also added the hammer provisions to create a strong incentive to assure that those standards are adopted and go into force. Section 112(j)(2) of the Act thus provides that "[i]n the event that the Administrator fails to promulgate a standard for a category . . . of major sources by the date established pursuant to subsection (e (1) and (3) of this section," prescribed consequences occur. 42 U.S.C. § 7412(j)(2). The first of these is that "18 months after such date, the owner or operator of any major source in such category . . . shall submit a permit application." Id. Permit writers (either federal or state) must then establish emission limitations for each major source which they "determin[e], on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an emission standard had been promulgated in a timely manner under subsection (d)." Id. § 7412(j)(5). These site-specific permit limitations can be superseded by subsequently promulgated national standards. Should such a standard be promulgated, the permitting authority "shall revise such permit upon the next renewal to reflect the standard . . . providing such a reasonable time to comply, but no longer than 8 years after such standard is promulgated or 8 years after the date on which the source is first required to comply with the [site-specific emission standard], whichever is earlier." Id. § 7412(j)(6). Thus there could be considerable delay before sources are subject to a national CAA section 112(d) standard once a section 112(j)(5) permit is issued.[4]

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[3](...continued)
troublesome questions and could create a great deal of confusion that could best be avoided by a stay of issuance of the mandate by the Court and issuance of the interim standards by EPA.

[4] The parallel provision for new major sources in section 112(g)(2) requires that any major new hazardous waste combustor source intending to commence construction or reconstruction must first obtain a site-specific new source determination unless the source is
(continued...)

It is Respondent EPA's view that the section 112(j) and 112(g)(2) hammers apply if the national Clean Air Act section 112(d) standards for hazardous waste combustors are vacated and no other national Clean Air Act section 112(d) standards are in place. This interpretation is based on the statutory language and evident Congressional purpose to create a default mechanism whenever there are no national Clean Air Act section 112(d) standards in place on or after the hammer date. In addition, this Court's precedents under an analogous provision in the Resource Conservation and Recovery Act indicate that vacatur could trigger hammer applicability. Steel Mfr's Ass'n v. EPA, 27 F.3d 642, 647-48 (D.C. Cir. 1994) (EPA reasonably construed hammer provision to mean that if a rule is issued but vacated so as not to be in place on the hammer date, then the hammer provision applies).

There are significant adverse consequences of vacating the existing rule and allowing the section 112(j) hammer to operate. First, the hammer requirement applies only to major sources of hazardous air pollutants. EPA determined pursuant to CAA section 112(c)(3), however, that regulation of all hazardous waste combustor area sources (i.e., sources below the major source threshold, see n. 2, supra) is necessary because of the threat of potential adverse effects to human health or the environment posed by these sources. 64 Fed. Reg. at 52,837-38. If the existing rule is vacated before EPA can promulgate interim standards, these area sources would not be subject to any CAA standards for hazardous air pollutants. EPA estimates that there are 32 of these sources, and that application of the current rule would result in reductions of approximately 90 metric tons per year of emissions of hazardous air pollutants from these area sources.

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[4](...continued)
subject to a national standard or a case-by-case standard issued pursuant to section 112(j). 42 U.S.C. § 7412(g)(2).

Vacatur of the existing rule would also mean that major hazardous waste combustor sources would not be subject to national CAA section 112(d) regulation for a prolonged period. Even if the case-by-case permitting process goes smoothly, permitting authorities have up to 18 months to issue such permits after a complete application is filed. See 40 C.F.R. § 70.4(b)(6). The permitting authority could then allow up to a 3-year compliance date (42 U.S.C. § 7412(j)(5)), so that sources may not be subject to emission standards until 2006. This is a marked delay from the statutory deadlines in section 112(e)(1)(E) for these sources to be subject to national emission standards: Standards were to be promulgated no later than November, 2000, and compliance with those standards is hence to be no later no later than November 2003. 42 U.S.C. §§ 7412(e)(1) and (i)(3).

Second, case-by-case permit limitations do not have to be modified to reflect more stringent subsequent national standards until the permit is renewed or until 8 years from the date the national standard is promulgated or 8 years from the time the permit is issued, whichever is earlier. 42 U.S.C. § 7412(j)(6). A scenario thus could result where major sources receive case-by-case permits in 2004 before EPA issues a national rule, and then might not have to comply with a national standard until 2012. This result is again far later than the expected 2003 date for compliance with national section 112(d) standards.

Finally, the case-by-case permitting process, with its hundreds of separate determinations, necessarily raises the prospect of potentially inconsistent determinations. The general statutory scheme, however, is that sources in a category or subcategory will be subject to a common standard. Such inconsistency could also lessen the degree of emission reduction Congress contemplated in requiring that sources be subject to national technology-based standards developed pursuant to section 112(d).

The case-by-case permitting process also poses adverse consequences for regulated sources. The immediate burden is to submit permit applications to federal or state permit-writing authorities. Because the date for cement kilns to submit permit applications was December 15, 1999 (64 Fed. Reg. 26,311 (May 14, 1999)), it is EPA's view that permit applications consequently would be due as soon as a mandate vacating the standards issued, if there is no interim rule in place. For lightweight aggregate kilns and incinerators, it is EPA's view that the date for submitting permit applications is May 15, 2002.

Some industry sources may also face the possibility that individual permit limits could be so inconsistent with later national standards that the source will have to develop a new strategy for achieving emission reductions (with consequent loss of investment in the equipment needed to comply with the case-by-case permit), and the prospect of continuing to comply with Resource Conservation and Recovery Act ("RCRA") permit conditions for air emissions. (The existing rules provide that RCRA air emission permit limits for these sources are no longer in force once the source demonstrates compliance with the national CAA standards, 40 C.F.R. §§ 270.62 and 270.66 promulgated at 64 Fed. Reg. at 53,077; see 255 F.3d at 858.)

The administrative burdens on EPA and on States administering Clean Air Act permit programs likewise will be severe if a case-by-case permitting process is triggered by immediate vacatur of the CAA section 112(d) rule. Permits are already required to incorporate all applicable requirements from Titles I and IV of the Act (including State Implementation Plans, New Source Review, Prevention of Significant Deterioration, New Source Performance Standards, hazardous air pollutants, and acid rain deposition). States are under significant time constraints to issue permits (see 40 C.F.R. § 70.4(b)(6), which requires States to issue permits within 18 months of submittal of a complete permit application). Processing hundreds of permit

applications from hazardous waste combustors, and trying to develop standards equivalent to maximum achievable control technology on a case-by-case basis, can only further complicate an already exceedingly difficult permit-issuance task.

Therefore, in light of the fact that Congress intended for national standards to already be in place for hazardous waste combustors, and that a case-by-case permitting regime for those combustors could have adverse consequences for regulated sources and state and federal permitting authorities, and (in the view of EPA and petitioner Sierra Club) for the environment as well, the Parties believe that there is good cause for the Court to stay issuance of its mandate until EPA develops an interim rule promulgating national standards for these sources.

III. EPA'S PLANNED COURSE OF ACTION IF ISSUANCE OF THE MANDATE IS STAYED

The details of actions EPA intends to take are attached to this Motion. We summarize those intended actions below.

Should the Court stay issuance of its mandate, EPA intends to promulgate the Interim Standards Rule by February 14, 2002. This rule would contain "interim standards," 255 F.3d at 872; see also Small Refiner Lead Phase-Down Task Force, 705 F.2d at 545-46 (inviting EPA to issue an interim rule to avoid a regulatory gap and noting that there probably exists "good cause" under 5 U.S.C. § 553(b)(B) to issue the rule without prior notice and opportunity for comment). EPA intends that this interim rule would respond to the concerns that prompted the Court to vacate rather than remand the challenged provisions, i.e., that challenges raised by industry petitioners having potential merit were not considered by the Court, by amending all of the provisions alluded to by the Court as examples of challenges with potential merit. 255 F.3d at 872. EPA also intends to amend additional standards that were the subject of petitions for review but were not mentioned

specifically by the Court. In addition, EPA intends to take final action by the same date on proposed rules dealing with amendments to certain of the implementation provisions of the rule, which provisions are the subject of separate petitions for review in No. 00-1249.[5]

The Parties emphasize that the contemplated Interim Standards Rule is in the nature of a remedy. It would not respond to the Court's mandate regarding the need to demonstrate that EPA's methodology reasonably predicts the performance of the average of the best performing twelve percent of sources (or best-performing source). EPA intends to address those issues in a subsequent rule, which will necessarily require a longer time to develop, propose, and finalize.[6] All parties understand that EPA has reached an agreement in principle with petitioner Sierra Club to issue such a rule no later than June 14, 2005, and after completion of the notice and comment process required by CAA section 113(g) (42 U.S.C. § 7413(g)), EPA and Sierra Club intend to submit a joint motion requesting the Court to enter an Order compelling EPA to promulgate revised regulations by that date. The nonopposition of all parties to the settlement agreement and subsequent motion is an essential part of Petitioner Sierra Club's participation in this Motion.

These are the same types of actions which EPA undertook in response to this Court's decision in Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 924 (D.C. Cir. 1998), and which this Court upheld. The circumstances here are analogous, as shown by this Court's reference to Columbia Falls. 255 F.3d at 872.

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[5] Litigation on these petitions has been stayed with the consent of all parties while EPA conducts rulemaking regarding these provisions. EPA proposed rules respecting these provisions at 66 Fed. Reg. 35,126 (July 3, 2001).

[6] The Petitioning Parties are not, by agreeing to any particular provisions in the initial interim rule, waiving their rights to object to any such provisions should they be included in the final standards promulgated in the subsequent notice-and-comment rulemaking process.

A. Rulemaking to Develop Interim Standards and Other Related Actions

1. Amendments to Provisions Which Were the Subject of Petitions for Review in this Proceeding.

In the Interim Standards Rulemaking, EPA intends to retain the existing standards except for the following changes:[7]

(1) Certain emission standards will be revised as follows: (a) the semi-volatile metals standard for new incinerators; (b) the semi-volatile metals standard for existing cement kilns; (c) the mercury standard for new cement kilns; (d) the dioxin standard for new and existing lightweight aggregate kilns; (e) the mercury standard for new and existing lightweight aggregate kilns; (f) the hydrochloric acid/chlorine gas standard for new and existing lightweight aggregate kilns.

(2) EPA intends to provide an alternative means for lightweight aggregate kilns and cement kilns to comply with the mercury standard to allow sources to comply with a hazardous waste mercury feedrate limit in lieu of complying with an emission standard. Sources electing to comply with this option will be required to notify the RCRA permitting authority that they are complying with this option.

(3) EPA intends to revise the startup, shutdown and malfunction (ASSM@) provisions to provide that emission standards and operating requirements set forth in the rule apply at all times except during periods of startup, shutdown and malfunction. EPA will also provide that hazardous waste combustors are subject to the same general MACT SSM provisions that apply to most sources, except that revised automatic waste feed cutoff requirements continue to apply during most SSM events, and sources must determine whether the SSM plan should be revised if

[7] EPA notes that the filing of this Joint Motion and the actions to be taken in the Interim Standards Rule do not affect prior EPA direct final rules, voluntary vacaturs, and technical corrections to the Hazardous Waste Combustor rule.

excessive exceedances of operating requirements when hazardous waste is in the system occur during these events. Such exceedances will not constitute violations of the operating requirements. In addition, owners and operators of hazardous waste combustors have the option to petition permit writers to develop alternative provisions relating to SSM. Upon the source showing that it meets certain enumerated conditions, permit writers can then either retain, revise or delete the source's RCRA permit conditions addressing emissions during SSM events. Finally, EPA will revise the emergency safety vent (AESV@) opening provisions to provide that if there is hazardous waste in the combustion chamber, and there is an ESV opening that is not a malfunction, the source must document whether it remains in compliance with applicable standards, and file a report if there is noncompliance.

2. Other Actions to be Included in the Interim Rule

To mitigate against the potential for sources being required to comply with a subsequent set of standards that are so inconsistent with the standards in the interim rule as to make worthless the capital invested to comply with the interim rule, EPA intends to take the following actions:

(1) Amend the performance testing requirements of 40 C.F.R. § 63.1207 to allow previously collected data, regardless of age, to serve as documentation of compliance with the interim emission standards provided that these data meet quality assurance requirements and are sufficient to establish operating parameter limits;

(2) Amend the performance testing provisions such that all subsequent comprehensive performance tests (that is, those after the initial comprehensive performance test) for the interim standards are automatically waived;

(3) Amend the confirmatory performance testing provisions to eliminate the requirement to conduct confirmatory performance testing during the period that the interim standards are in effect;

(4) Extend the compliance date by one year until September 30, 2003 in a rulemaking in advance of the Interim Standards Rulemaking. If EPA does not promulgate the Interim Standards Rule by April 30, 2002, then EPA intends to further extend the compliance date for that rule on a day-for-day basis for each additional day after April 30, 2002 until the interim rule is promulgated.

3. Action on Other Pending Amendments

EPA also intends to take final action on proposed amendments to implementation provisions of the rule which are not before the Court in the Petitions for Review in the present case, but are the subject of Petitions for Review in No. 00-1249.

B. Permanent Replacement Standards Rule

To resolve this litigation, all Industry Parties have agreed not to oppose a settlement between EPA and Petitioner Sierra Club which is limited to EPA and Sierra Club jointly requesting the Court to issue as part of its remedy in this case an Order compelling EPA to promulgate a final rule (the "Permanent Replacement Standards Rule") complying with the Court's decision within three years and four months of promulgation of the interim rule, namely by June 14, 2005, and EPA agreeing to issue final regulations by that date. Because this agreement is in the nature of a settlement, EPA believes that it is subject to the provisions of CAA section 113(g), 42 U.S.C. § 7413(g), which requires notice of settlement to be published in the Federal Register with an opportunity for comment. EPA intends to publish such a notice shortly, and submit the

agreed-on motion to the Court before the requested stay of the mandate ends on February 14, 2002 unless the comments reveal some reason why the agreement should not be completed.

EPA intends to propose as part of the final rulemaking process a provision that allows sources to initiate comprehensive performance testing within one year after the compliance date (instead of six months) and intends to propose a provision that gives sources three years after the effective date to comply with those standards, as provided by CAA section 112(i)(3). (All Parties may, of course, submit substantive comments on this projected rulemaking, addressing any issues that may be raised by that rulemaking.)

CONCLUSION

The Parties therefore believe that there is good cause for the Court to stay the issuance of the mandate in this case until February 14, 2002 in order to provide time for EPA to issue an interim rule adopting national standards for hazardous waste combustion sources.

Respectfully submitted,

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Dated: October 19, 2001

ATTACHMENT TO JOINT MOTION OF ALL PARTIES
FOR STAY OF ISSUANCE OF MANDATE

EPA's Intended Actions To Address The Court's Opinion

EPA intends to address the Court's decision in Cement Kiln Recycling Coalition v. EPA, No. 99-1457 (D.C. Cir. 2001) through the following four rulemaking actions:

1. A final rule promulgated as quickly as possible without notice and comment in accordance with the good cause provisions of the Administrative Procedure Act extending the compliance date of the standards to September 30, 2003. This rule will be referred to as the "Compliance Date Extension Rule." (If EPA does not promulgate the Interim Standards Rule and the Final Amendments Rule described below by April 30, 2002, EPA intends to further extend the compliance date on a day-for-day basis for each additional day after April 30, 2002 until the Interim Standards Rule and Final Amendments Rule are promulgated.)

2. A final rule promulgated on or before February 14, 2002 without notice and comment in accordance with the good cause provisions of the Administrative Procedure Act containing interim emission standards and other compliance provisions for hazardous waste combustors as described in Section I below. This rule will be referred to as the "Interim Standards Rule."

3. A final rule promulgated on or before February 14, 2002 making a final determination on previously proposed changes to the implementation provisions of the existing rule, as described in Section II below. This rule will be referred to as the "Final Amendments Rule."

4. A final rule promulgated on or before June 14, 2005 containing revised standards for hazardous waste combustors in accordance with the Court's decision. This rule will be referred to as the "Permanent Replacement Standards Rule."

EPA recognizes that if the Compliance Date Extension Rule, Interim Standards Rule, or Final Amendments Rule as promulgated differ from EPA's intent as described below in a way that materially affects any Petitioners' willingness to participate in the Joint Motion to Stay the Mandate, any Petitioner may, after notice to all parties, withdraw from the Joint Motion to Stay the Mandate and petition the Court to issue the mandate or otherwise resolve the issue.

I. The Interim Standards Rule

EPA intends that the Interim Standards Rule will include the revised emission standards and other revisions to the September 1999 Final Rule described below.

A. Revised Emission Standards

In the Interim Standards Rule EPA intends to make the following changes to the emission standards in the 1999 Final Rule:

1. Revise the semivolatile metals standard of §63.1203(b)(3) for new incinerators to 120 ：g/dscm.

2. Revise the semivolatile metals standard of §63.1204(a)(3) for existing cement kilns to 330 ∶g/dscm.

3. Revise the mercury standard of §63.1204(b)(2) for new cement kilns to 120 ∶g/dscm.

4. Revise the new and existing cement kiln mercury standard to allow sources to comply with a hazardous waste mercury MTEC feedrate limit of 120 ∶g/dscm in lieu of complying with an emission standard of 120 ∶g/dscm. Sources electing to comply with this option will be required to notify the RCRA authority that they are complying with this option.

5. Revise the dioxin/furan standard of §§63.1205(a)(1) and (b)(1) for new and existing lightweight aggregate kilns to 0.20 ng TEQ/dscm; or rapid quench of the combustion gas temperature at the exit of the (last) combustion chamber (or exit of any waste heat recovery system) to 400/F or lower based on the average of the test run average temperatures. Sources electing to comply with the temperature control option will be required to notify the RCRA authority that they are complying with this option.

6. Revise the mercury standard of §§63.1205(a)(2) and (b)(2) for existing and new lightweight aggregate kilns to 120 ∶g/dscm.

7. Revise the new and existing lightweight aggregate kiln mercury standard to allow sources to comply with a hazardous waste mercury MTEC feedrate limit of 120 ∶g/dscm in lieu of complying with an emission standard of 120 ∶g/dscm. Sources electing to comply with this option will be required to notify the RCRA authority that they are complying with this option.

8. Revise the hydrochloric acid/chlorine gas standard of §§63.1206(a)(6) and (b)(6) for new and existing lightweight aggregate kilns to 600 ppmv.

B. Other Intended Revisions to the September 1999 Final Rule

In the Interim Standards Rule, EPA intends to make the following additional revisions to the provisions of the 1999 Final Rule:

1. Revise the startup, shutdown, and malfunction provisions and emergency safety vent opening provisions consistent with draft language provided in Appendix A. EPA will request comment on the revised startup, shutdown, and malfunction provisions and emergency safety vent opening provisions in the Permanent Replacement Standards Rulemaking.

2. Amend the performance testing requirements of §63.1207 to allow previously collected data, regardless of age, to serve as documentation of compliance with the interim emission standards provided that these data meet quality assurance requirements and are sufficient to establish operating parameter limits.

3. Amend the performance testing provisions of §63.1207 such that all subsequent comprehensive performance tests (i.e., those after the initial comprehensive performance test) for the interim standards are automatically waived.

4. Amend the confirmatory performance testing provisions of §63.1207(g)(2) to eliminate the requirement to conduct confirmatory performance testing during the period that the interim standards are in effect.

5. Delete the minimum power requirements for ionic wet scrubbers, consistent with the voluntary vacatur of the electrostatic precipitator operating parameter limits (see 66 Fed. Reg. at 24,272). EPA also will request comment on operating parameter limits for ionic wet scrubbers in the Permanent Replacement Standards Rulemaking.

6. Delete the requirement to conduct a confirmatory emission test to verify carbon bed age (§§63.1209(k)(7)(i)(C) and (l)(4)). Instead, EPA intends to require sources to monitor performance of the carbon bed consistent with manufacturer specifications and document the monitoring procedures in their operation and maintenance plan. These procedures must ensure the carbon bed has not reached the end of its useful life to control emissions of dioxin/furans and mercury.

7. Clarify that the Administrator or a State may grant an extension pursuant to §63.1206(b)(4) allowing an existing source up to one additional year beyond the compliance date for the Interim Standards Rule.

II. Final Amendments Rule

Following is the list of changes to the September 1999 final rules that EPA intends to finalize in the Final Amendments Rule. EPA's current position on the content of finalized amendments is also reflected below, noting that these descriptions reflect EPA's position prior to evaluating public comments on the Notice of Proposed Rulemaking. EPA will notify all parties in advance of the Interim Rules if the Agency is planning to finalize, based on its review of public comments, any requirements differently from the approach outlined in this Attachment. It is recognized that if there are any such changes that materially affect any Petitioners' willingness to participate in the Joint Motion to Stay the Mandate, any Petitioner may, after notice to all parties, withdraw from the Joint Motion to Stay the Mandate and petition the court to issue the mandate or otherwise resolve the issue.

In the Final Amendments Rule, EPA intends to make the following changes to the September 1999 Final Rule:

1. Amend the data in lieu of testing provisions by revising §§63.1206(b)(6), (b)(7), and 63.1207(c)(2) as noticed in direct final rule published on July 3, 2001, except that EPA intends to clarify that sources feeding waste in a location other than the flame zone cannot use data that are older than 5 years for data-in-lieu purposes.

2. Amend the provisions that apply to short cement kilns burning hazardous waste at locations other than the hot end of the kiln by revising §§63.1201(a) and 63.1206(b)(13) as noticed in the direct final rule published on July 3, 2001.

3. Delete the baghouse inspection requirements and revise §63.1206(c)(7)(ii) as noticed in the direct final rule published on July 3, 2001.

4. Amend the comprehensive performance test requirements for feedstream analysis for organics by revising §63.1207(f)(1)(ii) as noticed in the direct final rule published on July 3, 2001.

5. Amend the combustion system leaks provisions by revising §§63.1201(a), 63.1206(c)(5)(ii), and 63.1209(p) as proposed on July 3, 2001. In addition, EPA intends to add a provision to § 63.1206(c)(5)(i) to include the following language: "Upon prior written approval of the Administrator, other technique(s) which can be demonstrated to prevent fugitive emissions without use of instantaneous pressure limits." EPA also will request comment on the revised combustion system leaks provisions in the Permanent Replacement Standards Rulemaking.

6. Amend the operator training and certification provisions by revising §§63.14 and 63.1206(c)(6) as proposed on July 3, 2001.

7. Amend the test plan approval provisions by adding §63.1207(e)(3) as proposed on July 3, 2001. EPA also intends to correct the proposed language in §63.1207(e)(3) to require sources to submit a CMS evaluation test plan rather than the evaluation plan.

8. Amend the confirmatory performance testing provisions by revising §63.1207(g)(2) as proposed on July 3, 2001.

9. Amend the operating conditions during subsequent testing provisions by revising §63.1207(h)(2) as proposed on July 3, 2001, except that EPA intends to clarify that the 720 hours for pretesting purposes is renewable at the discretion of the Administrator, and also clarify that approval of the comprehensive performance test workplan is not needed to waive operating requirements for subsequent tests. EPA will request comment on the provisions waiving operator parameter limits during pretesting and subsequent performance testing when the performance test plan has not been approved in the Permanent Replacement Standards Rulemaking.

10. Amend the calibration requirements for thermocouples and other temperature sensors (§63.1209(b)(2)(i)) as follows: The calibration of thermocouples must be verified at a frequency and in a manner consistent with manufacturer specifications, but no less frequent than once per year. Sources shall operate and maintain optical pyrometers in accordance with manufacturer specifications unless otherwise approved by the Administrator. Optical pyrometers must be calibrated in accordance with the frequency and procedures recommended by the manufacturer, but no less frequent than annually, unless otherwise approved by the Administrator.

11. Amend the operating requirements for activated carbon injection and carbon bed systems by revising §§63.1209(k)(5) and (l)(3) as proposed on July 3, 2001.

12. Amend the provisions when operating under different modes of operation (i.e., operating under otherwise applicable standards after the hazardous waste residence time has transpired) by revising §63.1209(q) as proposed on July 3, 2001. EPA also intends to add a provision allowing sources to calculate rolling averages "anew" (instead of retrieving historical operating parameter data). This approach requires a source to calculate a valid rolling average value after the first minute of operation in the new mode of operation. This rolling average is updated cumulatively each minute until enough data are obtained to generate the applicable rolling average for compliance purposes (e.g., until 1 or 12 hours of data is obtained).

13. Amend the bag leak detection requirement provisions of § 63.1206(c)(7)(ii)(A) to read as follows: "The bag leak detection system must be certified by the manufacturer to be capable of continuously detecting and recording particulate matter emissions at concentrations of 1.0 milligram per actual cubic meter or less *unless a source demonstrates, pursuant to procedures in§ 63.1209(g)(1), that a higher sensitivity would be adequate to detect bag leaks*." EPA also will request comment on the revised bag leak detection provisions in the Permanent Replacement Standards Rulemaking.

III. Permanent Replacement Standards Rulemaking

In addition to requesting comment on the five specific issues described above (i.e., items 1 and 5 in Section I.B, and items 5, 9, and 13 in Section II of this Attachment), EPA intends to include the following in the proposal for the Permanent Replacement Standards Rulemaking:

1. a proposed provision that allows sources to initiate comprehensive performance testing within one year after the compliance date (as opposed to six months).

2. a proposed provision that gives sources three years after the date of promulgation to comply with the new standards.

APPENDIX A
Regulatory Language to Implement Revised SSMP and ESV Requirements

A. Startup, Shutdown, and Malfunction Plan (SSMP)

1. Revise 63.1206 (b)(1)(i) to read:

(b) *Compliance with standards*. (1) *Applicability*. The emission standards and operating requirements set forth in this subpart apply at all times except:
(i) During periods of startup, shutdown, and malfunction; and
* * * * *

2. Revise §63.1206(c)(2) to read:

(2) *Startup, shutdown, and malfunction plan*. (i) You are subject to the startup, shutdown, and malfunction plan requirements of §63.6(e)(3) of this chapter..
(ii) If you elect to comply with §270.42(k)(3) of this chapter to address RCRA concerns that you minimize emissions of toxic compounds from startup, shutdown, and malfunction events (including releases from emergency safety vents):
(A) The startup, shutdown, and malfunction plan must include a description of potential causes of malfunctions, including releases from emergency safety vents, that may result in significant releases of hazardous air pollutants, and actions the source is taking to minimize the frequency and severity of those malfunctions.
(B) You must submit the startup, shutdown, and malfunction plan to the Administrator for review and approval.
(*1*) *Approval procedure*. The Administrator will notify you of approval or intention to deny approval of the startup, shutdown, and malfunction plan within 90 calendar days after receipt of the original request and within 60 calendar days after receipt of any supplemental information that you submit. Before disapproving the plan, the Administrator will notify you of the Administrator's intention to disapprove the plan together with:
(*i*) Notice of the information and findings on which intended disapproval is based; and
(*ii*) Notice of opportunity for you to present additional information to the Administrator before final action on disapproval of the plan. At the time the Administrator notifies you of intention to disapprove the plan, the Administrator will specify how much time you will have after being notified on the intended disapproval to submit additional information.
(*2*) *Responsibility of owners and operators*. You are responsible for ensuring that you submit any supplementary and additional information supporting your plan in a timely manner to enable the Administrator to consider whether to approve the plan. Neither your submittal of the plan, nor the Administrator's failure to approve or disapprove the plan, relieves you of the responsibility to comply with the provisions of this subpart.
(C) *Changes to the plan that may significantly increase emissions*. (*1*) You must request approval in writing from the Administrator within 5 days after making a change to the startup, shutdown, and malfunction plan that may significantly increase emissions of hazardous air pollutants.

(*2*) To request approval of such changes to the startup, shutdown, and malfunction plan, you must follow the procedures provided by paragraph (c)(2)(ii)(B) of this section for initial approval of the plan.

(iii) You must identify in the plan a projected oxygen correction factor based on normal operations to use during periods of startup and shutdown.

(iv) You must record the plan in the operating record.

(v) *Operating under the startup, shutdown, and malfunction plan*. (A) *Compliance with AWFCO requirements during malfunctions*. (*1*) During malfunctions, the automatic waste feed cutoff requirements of §63.1206(c)(3) of this section continue to apply, except for paragraphs (c)(3)(v) and (c)(3)(vi). If you exceed a Subpart EEE emission standard monitored by a CEMS or COMs or operating limit specified under §1209, the automatic waste feed cutoff system must immediately and automatically cutoff the hazardous waste feed, except as provided by paragraph (c)(3)(viii) of this section. If the malfunction itself prevents immediate and automatic cutoff of the hazardous waste feed, however, you must cease feeding hazardous waste as quickly as possible.

(*2*) Although the automatic waste feed cutoff requirements continue to apply during a malfunction, an exceedance of an emission standard monitored by a CEMS or COMS or operating limit specified under §1209 is not a violation of this subpart if you take the corrective measures prescribed in the startup, shutdown, and malfunction plan.

(*3*) *Excessive exceedances during malfunctions*. For each set of 10 exceedances of an emission standard or operating requirement while hazardous waste remains in the combustion chamber (i.e., when the hazardous waste residence time has not transpired since the hazardous waste feed was cutoff) during a 60-day block period, you must:

(*i*) Within 45 days of the 10th exceedance, complete an investigation of the cause of each exceedance and evaluation of approaches to minimize the frequency, duration, and severity of each exceedance, and revise the startup, shutdown, and malfunction plan as warranted by the evaluation to minimize the frequency, duration, and severity of each exceedance; and

(*ii*) Record the results of the investigation and evaluation in the operating record, and include a summary of the investigation and evaluation, and any changes to the startup, shutdown, and malfunction plan, in the excess emissions report required under §63.10(e)(3) of this chapter.

(B) *Compliance with AWFCO requirements when burning hazardous waste during startup and shutdown*. (*1*) If you feed hazardous waste during startup or shutdown, you must include waste feed restrictions (e.g., type and quantity), and other appropriate operating conditions and limits in the startup, shutdown, and malfunction plan.

(*2*) You must interlock the operating limits you establish under paragraph (c)(2)(v)(B)(*1*) of this section with the automatic waste feed cutoff system required under §63.1206(c)(3) of this section, except for paragraphs (c)(3)(v) and (c)(3)(vi).

(*3*) When feeding hazardous waste during startup or shutdown, the automatic waste feed cutoff system must immediately and automatically cutoff the hazardous waste feed if you exceed the operating limits you establish under paragraph (c)(2)(v)(B)(*1*) of this section, except as provided by paragraph (c)(3)(viii) of this section.

(*4*) Although the automatic waste feed cutoff requirements of this paragraph apply during startup and shutdown, an exceedance of an emission standard or operating limit is not a violation of this subpart if you comply with the operating procedures prescribed in the startup, shutdown, and malfunction plan.

3. To retain, revise, or delete RCRA permit conditions addressing emissions during SSM events, add §270.42(k) to read:

(k) *Integration with part 63 MACT standards--options to minimize emissions from startup, shutdown, and malfunction events*. The owner or operator may request that the Director address permit conditions that minimize emissions from startup, shutdown, and malfunction events under any of the following options when requesting removal of permit conditions that are no longer applicable according to §§264.340(b) and 266.100(b) of this chapter:

(1) *Retain relevant permit conditions*. Under this option, the Director will:

(i) Retain permit conditions that address releases during startup, shutdown, and malfunction events, including releases from emergency safety vents, as these events are defined in the facility's startup, shutdown, and malfunction plan required under §63.1206(c)(2) of this chapter; and

(ii) Limit applicability of those permit conditions only to when the facility is operating under its startup, shutdown, and malfunction plan.

(2) *Revise relevant permit conditions*. (i) Under this option, the Director will:

(A) Identify a subset of relevant existing permit requirements, or alternative permit requirements, that ensure emissions of toxic compounds are minimized from startup, shutdown, and malfunction events, including releases from emergency safety vents, based on review of information including the source's startup, shutdown, and malfunction plan, design, and operating history.

(B) Retain or add these permit requirements to the permit to apply only when the facility is operating under its startup, shutdown, and malfunction plan.

(ii) *Changes that may significantly increase emissions*. (A) You must notify the Director in writing of changes to the startup, shutdown, and malfunction plan or changes to the design of the source that may significantly increase emissions of toxic compounds from startup, shutdown, or malfunction events, including releases from emergency safety vents. You must notify the Director of such changes within five days of making such changes. You must identify in the notification recommended revisions to permit conditions necessary as a result of the changes to ensure that emissions of toxic compounds are minimized during these events.

(B) The Director may revise permit conditions as a result of these changes to ensure that emissions of toxic compounds are minimized during startup, shutdown, or malfunction events, including releases from emergency safety vents either:

(*1*) Upon permit renewal, or, if warranted;

(*2*) By modifying the permit under §§270.41(a) or 270.42 of this chapter.

(3) *Remove permit conditions*. Under this option:

(i) The owner or operator must document that the startup, shutdown, and malfunction plan required under §63.1206(c)(2) of this chapter has been approved by the Administrator under §63.1206(c)(2)(ii)(B); and

(ii) The Director will remove permit conditions that are no longer applicable according to §§264.340(b) and 266.100(b) of this chapter.

B. Emergency Safety Vent (ESV)

Revise the ESV opening requirements of §63.1206(c)(4) to read:

ESV openings. (i) *Failure to meet standards*. If an emergency safety vent (ESV) opens when hazardous waste remains in the combustion chamber (i.e., when the hazardous waste residence time has not expired) during an event other than a malfunction as defined in the startup, shutdown, and malfunction plan such that combustion gases are not treated as during the most recent comprehensive performance test (e.g., if the combustion gas by-passes any emission control device that was operating during the performance test), you must document in the operating record whether you remain in compliance with the emission standards of this subpart considering emissions during the ESV opening event.

* * * * *

(iv) Reporting requirements. You must submit to the Administrator a written report within 5 days of an ESV opening that results in failure to meet the emission standards of this subpart (as determined in paragraph (c)(4)(i) of this section) documenting the result of the investigation and corrective measures taken.

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