ORAL ARGUMENT HELD MAY 12, 2014
DECIDED JUNE 27, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, et al.,	)	
Petitioners,	)	
v.	)	Docket No. 98-1379 (and consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	

MOTION FOR FURTHER STAY OF MANDATE

Respondents United States Environmental Protection Agency, et al. ("EPA") hereby move for an additional six-month stay of the issuance of the mandate in this case. The undersigned counsel has contacted counsel for the other parties in the case. Counsel for Petitioners have stated that Petitioners oppose this motion and intend to file a response. Counsel for Intervenor-Respondent American Chemistry Council ("ACC") represents that ACC supports the need for a stay in issuance of the Court's mandate, but believes that a longer stay than the six months requested by EPA is necessary. ACC intends to file a response in support of EPA's motion that will include a request for affirmative relief in the form of a longer stay of the mandate.

The consolidated petitions in this case sought review of EPA's Comparable Fuels Rule, 63 Fed. Reg. 33,782 (June 19, 1998), which EPA promulgated pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k ("RCRA"). In the Comparable Fuels Rule, EPA determined that certain materials, which would otherwise be classified as hazardous waste, were not so classified if they met specified standards and were combusted in units subject to regulation under the Clean Air Act. To qualify as a comparable fuel, a material had to meet standards for heating value and viscosity to ensure that the fuels have sufficient heat value to combust well, and that their physical form is consistent with routinely combusted commercial fossil fuels. The rule also specified maximum concentrations of hazardous constituents to ensure that the level of hazardous constituents in the comparable fuel is consistent with that in specified commercial fossil fuels that could be burned in place of the comparable fuel. The Agency determined that these materials posed no more of a risk to human health and the environment than the fossil fuels they replace and believed that the rule furthered RCRA's twin goals of conserving resources from hazardous wastes through properly conducted recycling and reuse while protecting human health and the environment. 42 U.S.C. § 6902(a)(1),(6).

Petitions for review of the Comparable Fuels Rule were filed by both industry and environmental groups in 1998 and consolidated under *Cement Kiln Recycling Coalition v. EPA*, No. 98-1378. EPA entered into settlement negotiations with the industry groups

and the cases were held in abeyance. In 2008, EPA promulgated a rule generally expanding the comparable fuels provision. 73 Fed. Reg. 77,954 (Dec. 19, 2008) ("Emissions-Comparable Fuel Exclusion"). The industry groups subsequently dismissed their petitions for review that had been consolidated into this case. However, the Emissions-Comparable Fuel Exclusion was withdrawn in 2010. 75 Fed. Reg. 33,712 (June 15, 2010). No petitions for review were filed challenging EPA's withdrawal of the Emissions-Comparable Fuel Exclusion.

On December 21, 2012, Petitioners moved to remove this case from abeyance (ECF No. 1411609) after EPA denied Petitioners' petition for reconsideration of a separate rule entitled "Regulation of Oil-Bearing Hazardous Secondary Materials From the Petroleum Refining Industry Processed in a Gasification System to Produce Synthesis Gas," 73 Fed. Reg. 57 (Jan. 2, 2008) ("Gasification Rule"), which is the subject of *Sierra Club v. EPA*, No. 08-1144. The Court granted that motion in an Order dated March 15, 2013, ECF No. 1425647.

In an opinion issued June 27, 2014, the Court determined that the Rule is inconsistent with the requirements of RCRA and vacated the Rule. 755 F.3d 1010 (D.C. Cir. 2014). The Court stayed issuance of the mandate until 7 days after disposition of any timely petition for rehearing or rehearing en banc. ECF No. 1499641. On August 1, 2014, EPA filed a motion to stay issuance of the mandate for 30 days to allow EPA to investigate the status of facilities that have been utilizing the comparable fuels exclusion

and what will be required for them to come into compliance with the newly applicable RCRA requirements. ECF No. 1505795. The Court granted that motion by Order dated August 7, 2014, staying issuance of the mandate through September 17, 2014. ECF No. 1506588.[1]

During the last 30 days, EPA has been gathering information on the facilities presently utilizing the comparable fuels exclusion. EPA has gathered information from the States, its Regional offices, and ACC to identify facilities that had filed notifications indicating they intended to manage comparable fuels. EPA has determined that approximately 30 facilities are currently utilizing the comparable fuels exclusion. Declaration of Barnes Johnson ("Johnson Decl.") ¶ 9. EPA expects that the vast majority of those facilities will cease burning these materials and ship them off-site to a hazardous waste treatment, storage, or disposal facility. *Id*. ¶ 10. The remaining facilities will need to come into compliance with the applicable RCRA and Clean Air Act requirements for combustion of these materials. *Id*. ¶ 11.

Based on this information, EPA is requesting that the Court stay issuance of the mandate in this case for six months, which is consistent with RCRA's statutory provision that regulations concerning hazardous waste management take effect six months after promulgation unless EPA determines that special circumstances warrant a shorter period,

[1] Issuance of the mandate is also currently stayed pending resolution of the petition for rehearing or rehearing en banc filed by Intervenor-Respondents American Chemistry Council. ECF No. 1507105.

42 U.S.C. § 6930(b). Facilities that are currently burning comparable fuels generated on-site may have to create or upgrade infrastructure, such as tanks, piping, and truck loading racks, to enable the materials to be temporarily stored and transferred to trucks for shipment to a hazardous waste treatment, storage, or disposal facility. These generators will also have to identify and contract with appropriate transporters and treatment, storage, or disposal facilities. They will also have to identify and contract with alternative sources of fuel. EPA believes that six months is a reasonable time for most generators (including generators with hazardous waste storage units) to come into compliance with RCRA. Johnson Decl. ¶ 40.

Sources intending to continue burning must have all air pollution control devices and applicable operating and monitoring equipment in place in order to comply with applicable emission standards and to document the basis for that compliance. EPA recognizes that six months is not sufficient time for facilities that want to continue burning the comparable fuel material to come into compliance with the applicable RCRA and Clean Air Act requirements, and that even some facilities which are ceasing burning may require more time to come into compliance with the RCRA generator standards. EPA presently believes that these facilities can be addressed by EPA or, if applicable, the State permitting or enforcement authority. Johnson Decl. ¶¶ 35-40.

Following is a more detailed description of the regulatory requirements that will become applicable to facilities currently generating and combusting comparable fuels and the actions needed for them to come into compliance.

A. RCRA REQUIREMENTS

RCRA imposes requirements on both facilities that generate hazardous waste and those that treat, store, or dispose of hazardous waste. Once the Court issues the mandate vacating the comparable fuels exclusion, the materials currently managed as comparable fuels will be regulated as hazardous waste. All the facilities that generate a comparable fuel will then be subject to regulation as hazardous waste generators. Any facility that continues to combust the material will be subject to regulation as a hazardous waste treatment, storage, or disposal facility.

Facilities that newly become hazardous waste generators are required to notify EPA, 42 U.S.C. § 6930, and obtain an EPA identification number in accordance with 40 C.F.R. § 262.12. Johnson Decl. ¶ 13. In addition, on the date the Court's mandate is issued, generators managing previously-excluded comparable fuels must be in compliance with the generator requirements set forth in 40 C.F.R. part 262, including standards for waste determination (40 C.F.R. § 262.11), compliance with waste tracking requirements (40 C.F.R. §§ 262.20 to 262.23), pre-transport procedures (40 C.F.R. §§ 262.30 to 262.34), and recordkeeping and reporting requirement (40 C.F.R. §§ 262.40 to 262.44). Johnson Decl. ¶ 14.

Because most of these facilities will be large quantity generators, they must also meet the requirements set forth in 40 C.F.R. § 262.34 for on-site storage of hazardous waste (of no more than 90 days), which include requirements for management in tanks that meet detailed technical specifications set forth in 40 C.F.R. part 265, including the air emissions standards found in 40 C.F.R. part 265 Subpart CC, and emergency preparedness and prevention requirements. Johnson Decl. ¶ 15.

Facilities that store hazardous waste on-site for more than 90 days are subject to more extensive requirements, including the requirement to obtain a RCRA permit. *Id.* ¶¶ 16-25. Similarly, facilities that intend to continue combusting comparable fuels must obtain a RCRA permit. *Id.* ¶¶ 26-27. Such facilities are required to notify EPA and must also submit Part A of the RCA permit application to EPA or to the State permitting authority within 30 days after the date they first become subject to the standards set forth in 40 C.F.R. part 265 or 266, unless EPA extends the date by publication in the Federal Register in accordance with 40 C.F.R. § 270.10(e)(2). *Id.* ¶ 19. Submittal of the Part A application allows a facility to operate in interim status until its Part B permit application is submitted and acted upon. *Id.* ¶ 20. In addition to technical requirements that apply to specific units, permitted and interim status facilities are subject to general facility requirements, the preparedness and prevention requirements, contingency plan and emergency procedure requirement, manifest, recordkeeping and reporting requirements,

closure and post-closure requirements, corrective action requirements, including facility-wide corrective action, and financial assurance requirements. *Id.* ¶ 17.

B. CLEAN AIR ACT REQUIREMENTS

Those facilities that choose to continue to combust comparable fuels are subject not only to hazardous waste management standards under RCRA, but also to regulation under the Clean Air Act regulations applicable to hazardous waste combustors. 40 C.F.R. part 63 subpart EEE (sections 63.1200-1221), Johnson Decl. ¶¶ 26-34. These requirements will become effective immediately upon issuance of the Court's mandate. The Clean Air Act regulations not only impose emission standards controlling the concentration of hazardous air pollutants that a facility may emit, but also prescribe detailed requirements and procedures by which facilities must demonstrate and show continuous compliance with the emission standards. This process ultimately requires a comprehensive compliance test. *Id.* ¶ 34. One year prior to performance of the compliance test the facility must submit a test plan for EPA's approval. *Id.*

Six months prior to performance of the compliance test, the facility must place a Documentation of Compliance in its operating record that demonstrates how the facility will comply with the Clean Air Act requirements by identifying limits on operating parameters that will ensure compliance with the emission standards. *Id.* ¶¶ 32-34. The action of placing a Documentation of Compliance in the operating record allows the facility to begin burning comparable fuels as a hazardous waste combustor. In order for

the facility to operate under its Documentation of Compliance, the facility will need to have installed and be continuously operating the required continuous emissions monitoring systems, along with other operating and parametric monitoring equipment. *Id.* ¶¶ 32, 33. These continuous emission monitoring systems, for example, are not purchased "off-the-shelf." Among other things, they must be designed, installed, calibrated, and integrated into a facility's data acquisition network, a process taking considerable time, and undoubtedly longer than 6 months. *Id.* ¶¶ 35-38.

EPA recognizes that the six-month stay of issuance of the mandate is not sufficient for facilities to come into compliance with these Clean Air Act regulations. When EPA issued the regulations applicable to hazardous waste combustors in 2005, EPA provided a three year compliance period, which is consistent with section 112(i)(3) of the Clean Air Act, 42 U.S.C. § 7412(i)(3). Johnson Decl. ¶ 29. EPA also recognizes that the facilities likely to want to continue combusting comparable fuels are those generating large volumes of these materials on-site, and thus continued combustion (consistent with Clean Air Act requirements for combustion of hazardous waste) is not only the most practical method of managing these materials, but also has environmental benefits by avoiding emissions during transport and any potential risk of in-transit spills. EPA intends that these facilities be addressed through EPA and/or State permitting or enforcement authorities. Johnson Decl. ¶ 39.

C. A SIX-MONTH STAY OF THE MANDATE IS APPROPRIATE

As documented in detail in the Declaration of Barnes Johnson, the numerous applicable regulatory requirements cannot be met overnight. Indeed, for some facilities, even 6 months may be insufficient. Johnson Decl. ¶¶ 39, 40. This conclusion is corroborated by the statute itself, which ordinarily allows facilities 6 months to comply with newly promulgated hazardous waste management regulations. Thus, RCRA section 3010(b), 42 U.S.C. § 6930(b), provides that hazardous waste regulations take effect 6 months after promulgation unless EPA determines that such time is not needed for compliance, the regulation addresses an emergency situation, or there is otherwise good cause for a shorter time period. EPA does not believe that any of those factors apply here, and thus if EPA had revoked the comparable fuels exclusion through rulemaking, this provision would require that the regulation become effective six months after promulgation. Furthermore, the comparable fuel regulation has been in effect for 16 years, and the regulated community has reasonably relied on it. Because vacatur of the exclusion by the Court has the same effect as administrative revocation of the exclusion, EPA believes that it would be appropriate, and consistent with congressional intent, for the Court to stay issuance of the mandate for six months.

As noted above, EPA recognizes that this is not sufficient time for facilities that intend to continue combustion to come into regulatory compliance and that six months may also not be sufficient time for some facilities that decide to stop combustion to come

into compliance if they have to engage in significant construction of tanks or other structures. EPA presently intends that such facilities be addressed through EPA and/or State permitting or enforcement authorities, and the six-month stay would allow EPA and/or the State to work through the administrative details.

Therefore, EPA believes that a six-month stay of issuance of the mandate would be a reasonable exercise of the Court's equitable discretion that would give facilities a reasonable time to come into compliance with newly applicable requirements. This Court has previously recognized that a stay of the mandate can be appropriate where a transition period is required after existing regulations have been vacated. *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998). Such a period is particularly appropriate in this case where the vacated rule has been in effect for 16 years.

Furthermore, there is no reason to believe that a stay will have adverse environmental impacts. The comparable fuels being combusted have levels of contaminants lower than or equal to the fossil fuels that are likely to replace them, and are generally cleaner burning fuels than many types of replacement fossil fuels. For example, levels of toxic metals in comparable fuels are considerably less than those found in coal. Moreover, comparable fuels combusted on-site pose less risk from transportation, and generate less pollution from transportation, than they will when shipped off-site to a hazardous waste facility.

CONCLUSION

The Court should stay issuance of the mandate for six months.

Respectfully submitted,

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September 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were today served, this 15th day of September, 2014, through the Court's CM/ECF system on all registered counsel.

/s/ Norman L. Rave, Jr.
NORMAN L. RAVE, JR.
Counsel for Respondent EPA

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DECLARATION OF BARNES JOHNSON

I, Barnes Johnson, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my own personal knowledge or on information contained in the records of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

1. I am the Director of the Office of Resource Conservation and Recovery ("ORCR"), Office of Solid Waste and Emergency Response ("OSWER") at EPA, a position I have held since July 2013. ORCR is the EPA office that has the primary responsibility for developing regulations that implement the Resource Conservation and Recovery Act ("RCRA") programs, including the hazardous waste regulatory program. ORCR also developed and actively assists in the implementation of hazardous waste combustor emissions standards, which implement section 112 (d) of the Clean Air Act ("CAA") (42 U.S.C. section 7912 (d)).

2. Prior to becoming the Director of ORCR, I have worked in senior management positions in other OSWER Offices, as well as in the Office of Air and Radiation, Office of Policy, Office of Waste Programs Enforcement, and Office of Water. I have masters degrees in wildlife and fisheries management and applied statistics.

3. In my current capacity as Director of ORCR, I am responsible for overseeing EPA's implementation of major portions of RCRA, including the promulgation of significant regulations pursuant to RCRA, and regulations pursuant to the CAA that affect facilities subject to RCRA. In this capacity, I am familiar with the processes required for facility compliance with EPA regulations under 40 C.F.R. parts 264, 265, 266, and 270 and 40 C.F.R. part 63 Subpart EEE.

4. This declaration is filed in support of EPA's motion to stay the issuance of the Court's mandate for the vactur of the comparable fuels rule (755 F.3d 1010 (D.C. Cir. 2014)). The purpose of this declaration is to describe the major RCRA and CAA requirements that would apply to facilities when the Court's mandate goes into effect, and the time frames by which they must comply with those requirements.

II. Background on Comparable Fuels Rule

5. EPA promulgated the "Comparable Fuels Rule"[1] in 1998. The rule provides that fuels produced from hazardous wastes will be considered products, and not RCRA solid wastes, if, as generated or after treatment and blending, the concentration of hazardous constituents in the fuel are comparable to hazardous constituent levels in commercial fossil fuels that could be burned in place of the fuel produced from hazardous waste. In addition, comparable fuels must have physical properties – notably fuel/energy content (Btu) and viscosity – which are at least equal to those of commercial fossil fuels. Because the fuels, as burned, would contain contaminants no greater than contaminants in commercial fossil fuels, EPA found that the comparable fuels would pose no greater risk than commercial fuels when burned.

6. The comparable fuels rule was vacated by United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), on June 27, 2014 (Natural Resources Defense Council v. EPA, No.98-1379).

[1] See "Hazardous Waste Combustors; Revised Standards," 63 FR 33,782, 33,783-801, 33,823-35 (June 19, 1998).

7. On August 7, 2014, the court granted a motion by EPA requesting a 30-day stay of the issuance of the mandate in this case in order to gather information to help plan for an orderly transition consistent with the opinion, setting the date of the Court's mandate for September 17, 2014.

III. Implementation of the Vacatur after the Court's Mandate Is Issued

8. On the date the Court's mandate is issued, previously-excluded comparable fuels will be regulated RCRA hazardous wastes and facilities that continue to manage them after that date must comply with all applicable regulations under RCRA subtitle C. Facilities that continue to burn the previously-excluded comparable fuels will also be subject to regulation as Hazardous Waste Combustors pursuant to regulations at 40 C.F.R. part 63 subpart EEE which implement section 112(d) of the Clean Air Act (CAA), 42 U.S.C. section 7912(d).

9. EPA has identified 30 facilities that appear to have been operating under the comparable fuels rule, based on information provided to the Agency by States (who are the primary implementing agencies for the comparable fuels rule), and supplemental information provided by the regulated community. EPA notes that it is possible that some of these facilities are no longer burning comparable fuels, and that there may also be additional facilities that EPA has not yet been able to identify that have been operating under the comparable fuels rule.

10. EPA expects that, for most facilities operating under the comparable fuels exclusion, the most economical option will be to cease burning the previously-excluded comparable fuels. These facilities would replace the comparable fuels with commercial fuels, and subsequently manage the comparable fuels as hazardous waste in conformance with the requirements of the federal regulations implementing subtitle C of RCRA.

11. In a few cases, for example, where the previously-excluded comparable fuels comprise a large portion of a facility's primary fuel source, a facility may choose to continue burning comparable fuels, in which case the facility would need to comply with both the regulations implementing subtitle C of RCRA, and the emission standards and operating requirements applicable to hazardous waste combustion facilities which implement section 112 (d) of the CAA (42 USC section 7912 (d)).

12. The following sections describe the major RCRA Subtitle C and CAA requirements that would apply to different facility categories when the Court's

mandate is issued. The detailed requirements can be found in the regulations at 40 C.F.R. parts 260 to 268, 270 to 279, and 124, 40 C.F.R. part 63 subpart EEE and 40 C.F.R. part 70.

A. Requirements that Apply to Generators Who Accumulate Hazardous Waste For Less than 90 days Before Sending the Wastes Off-Site

13. All persons who continue to manage previously-excluded comparable fuels after the date the Court's mandate is issued are required to notify EPA per RCRA section 3010, 42 U.S.C. § 6930, and obtain an EPA identification number in accordance with 40 C.F.R. § 262.12.

14. In addition, on the date the Court's mandate is issued, generators managing previously-excluded comparable fuels must be in compliance with the generator requirements set forth in 40 C.F.R. part 262. These requirements include standards for waste determination (40 C.F.R. § 262.11), compliance with all tracking requirements ("manifest") (40 C.F.R. §§ 262.20 to 262.23), pre-transport procedures (40 C.F.R. §§ 262.30 to 262.34), recordkeeping and reporting (40 C.F.R. §§ 262.40 to 262.44), and the import/export procedures (40 C.F.R. §§ 262.50 to 262.60).

15. Generators [2] must also meet the requirements set forth in 40 C.F.R. § 262.34 in order to be exempt from the requirement to obtain a RCRA permit to store hazardous wastes. These include (a) a 90-day accumulation time limit, (b) management requirements for tanks that meet detailed technical specifications set forth in 40 C.F.R. part 265, including the air emissions standards found in 40 C.F.R. part 265 Subpart CC, and (c) emergency preparedness and prevention requirements, including the development of a contingency plan to be used in case of fire, explosion, or release of hazardous waste.

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[2]These requirements apply to generators that generate more than ≥1,000 kg/month of hazardous waste, >1 kg/month of acute hazardous waste, or >100 kg/month of acute spill residue or soil. Facilities generating previously-excluded comparable fuels are generally expected to be in this category. Generators that generate more than 100kg/month and less than 1,000 kg/month of hazardous waste are subject to the same requirements except (1) they have a longer accumulation time limit, (2) they are subject to fewer technical standards for tanks or containers, (3) they are not required to file a Biennial Report, (4) they have simplified training, contingency plan, and emergency procedure requirements, and (5) they have a maximum accumulation volume of 6000 kg.

B. Requirements that Apply to Generators Who Accumulate Hazardous Waste For More than 90 days or Are Otherwise Subject to a RCRA Storage Permit

16. In addition to being subject to the requirements described in paragraph 13 and 14 above, generators that accumulate hazardous waste and do not meet the conditions in 40 C.F.R. § 262.34 (e.g., generators that accumulate hazardous waste for more than 90 days) are considered to be storage facilities, and are subject to RCRA permitting requirements.

17. Specifically, storage facilities are subject to the RCRA section 3010 notification requirements, the permit requirements in 40 C.F.R. part 270, and regulations in 40 C.F.R. part 264 or 267 for permitted facilities or part 265 for interim status facilities, including the general facility requirements in subpart B, the preparedness and prevention requirements in subpart C, the contingency plan and emergency procedure requirement in subpart D, the manifest, recordkeeping and reporting requirements in subpart E, the closure and post-closure requirements in subpart G, the corrective action requirements, including facility-wide corrective action in subpart F, and the financial assurance requirements in subpart H . In addition, unit-specific standards would apply, such as the tank standards in 40 C.F.R. part 265 subpart J and the air emissions standards in 40 C.F.R. part 265 subparts AA, BB, and CC.

18. Pursuant to RCRA section 3010 and 40 C.F.R. § 270.1(b), storage facilities managing previously-excluded comparable fuels that become subject to regulation under RCRA subtitle C must notify EPA of their waste management activities. This requirement may be applicable even to those facilities that have previously notified EPA with respect to the management of other hazardous wastes. Any person who treats, stores, or disposes of these wastes and has not previously received an EPA identification number must obtain an identification number pursuant to 40 C.F.R. § 262.12 to generate, transport, treat, store, or dispose of previously-excluded comparable fuels within 90 days after the effective date of the rule.

19. In accordance with RCRA section 3005(e)(1)(A)(ii) and 40 C.F.R. § 270.10(e)(1)(ii), owners and operators of facilities in existence on the effective date of statutory or regulatory amendments under the act that render the facility subject to the requirement to have a RCRA permit must submit a part A permit application no later than 30 days after the date they first become subject to the

standards set forth in 40 C.F.R. part 265 or 266, unless EPA extends the date by publication in the Federal Register in accordance with 40 C.F.R. § 270.10(e)(2).

20. After the deadline for filing part A of the permit application, the treatment, storage and/or disposal of previously exempted comparable fuels by any person who has not applied for or received a RCRA permit is prohibited. Timely submission of Part A of the permit application and the notification required under RCRA section 3010 qualifies a facility for interim status under section 3005(e)(1) of RCRA; such facilities are treated as having been issued a permit until a final decision is made on a permit application. During interim status, owners or operators shall comply with the interim status standards at 40 CFR part 265. (see 40 C.F.R. 270.71(b))

C. Facilities Newly Subject to RCRA Permit Requirements

21. Facilities that treat, store, or dispose of previously excluded comparable fuels after the date the Court's mandate is issued would generally be to subject to interim status requirements pursuant to section 3005 of RCRA (see section 3005(e)(1)(A)(ii) of RCRA). See 40 C.F.R. § 270.71(b).

22. In order to qualify for interim status based on treatment, storage, or disposal of wastes, eligible facilities are required to comply with 40 C.F.R. §§ 270.70(a) and 270.10(e) (or with analogous state regulations) by providing notice under RCRA section 3010 (if they do not have an EPA identification number) and by submitting a Part A permit application. During interim status, owners or operators shall comply with the interim status standards at 40 CFR part 265. (see 40 C.F.R. 270.71(b))

D. Existing Interim Status Facilities

23. Pursuant to 40 C.F.R. § 270.72(a)(1), all existing interim status facilities (as defined in 40 C.F.R. § 270.2) that treat, store, or dispose of previously-excluded comparable fuels must file an amended Part A permit application with EPA prior to treating, storing or disposing of the previously-excluded comparable fuels (which will at that point be regulated as hazardous wastes). Upon filing of the amended Part A, the facility may continue managing the previously-excluded wastes by complying with the requirements under 40 C.F.R. part 265.

24. If the facility fails to file an amended Part A application by the deadline, the facility will not qualify for interim status for management of the previously-excluded comparable fuels and may not manage those wastes until the facility

receives either a permit or a obtains a change in interim status allowing such activity (40 C.F.R. § 270.10(g)).

E. Permitted Facilities

25. Under 40 C.F.R. § 270.42(g), facilities that already have RCRA permits must request permit modifications if they want to continue managing the previously-excluded comparable fuels (per 40 C.F.R. § 270.42(g)). The permittee may continue managing the previously-excluded comparable fuels by following certain requirements, including submitting a Class 1 permit modification request on or before the date the Court's mandate is issued, and by complying with the applicable standards of 40 C.F.R. parts 265 and 266 and later submitting a Class 2 or 3 permit modification request within 180 days of the date the Court's mandate is issued.

F. Combustion Facilities

26. EPA anticipates that most facilities that had been burning previously-excluded comparable fuels will stop burning and will find other hazardous waste management alternatives. However, in some cases a facility may decide to continue burning the previously-excluded comparable fuels in compliance with RCRA Subtitle C and the Clean Act Air requirements under 40 C.F.R. part 63 subpart EEE.

27. These facilities would be subject to all the RCRA permitting requirements for any storage of their waste as described above, as well as additional requirements applicable to hazardous waste combustors under both RCRA and CAA. In most cases, these facilities would also be considered hazardous waste boilers and process heaters subject to RCRA subtitle C requirements under 40 C.F.R. part 266 subpart H and CAA requirements in 40 C.F.R. part 63 subpart EEE.

28. For the CAA, 40 C.F.R. part 63 subpart EEE, sources burning hazardous waste as defined in 40 C.F.R. §261.3 are subject to Maximum Achievable Control Technology (MACT) standards for hazardous waste combustors (HWC).

29. Under the current HWC MACT regulations, the compliance date for existing sources (e.g., boilers and process heaters burning hazardous waste) was October 14, 2008 (40 C.F.R. § 63.1206(a)(2)(i)). When the EPA issued final regulations for HWC MACT sources on October 12, 2005, the EPA provided three years after the date of final rule for affected sources to come into compliance with the requirements (70 FR at 59412). At proposal, the EPA believed that the three year

period for compliance was necessary "to allow adequate time to design, install, and test control systems that will be retrofitted onto existing units." (69 FR at 21313 (April 20, 2004). This conclusion is consistent with section 112 (i)(3) of the CAA (42 USC section 7912 (i)(3)) which provides up to three years for existing sources to comply with section 7912 (d) emission standards.

30. For the facilities burning a previously-excluded comparable fuel, since the compliance date has passed, this means that these facilities would have to meet all applicable requirements in the HWC MACT regulations as of the date the Court's mandate issues, which becomes the compliance date for these sources, in order to continue burning the previously-excluded comparable fuels.

31. HWC MACT standards include emission limits for particulate matter, mercury, semi and low volatility metals, chlorinated dioxins and furans, other toxic organic compounds, and hydrogen chloride and chlorine. These regulations also specify compliance requirements by when and how sources must comply with the emission standards and operating requirements, prescribe detailed monitoring requirements by which sources show continuous compliance with the emission standards, and prescribe performance testing requirements by which sources demonstrate compliance with the emission standards.

32. These initial compliance requirements include: placing in the facility's operating record a Documentation of Compliance by the compliance date identifying the operating parameter limits that, using available information, will ensure compliance with the emission standards (40 C.F.R. § 63.1211(c)); preparing and operating under a startup, shutdown, and malfunction plan that describes in part the procedures for operating and maintaining the source during such periods (40 C.F.R. § 63.1206(c)(2)); installing and operating an automatic waste feed cutoff system that links the operating parameter limits to the waste feed cutoff system (40 C.F.R. § 63.1206(c)(3)); controlling combustion system leaks (40 C.F.R. § 63.1206(c)(5)); establishing and complying with an operator training and certification program (40 C.F.R. § 63.1206(c)(6)); and establishing and operating under an operation and maintenance plan that details procedures for operation, inspection, maintenance, and corrective measures for all components of the combustor and associated air pollution control equipment (40 C.F.R. § 63.1206(c)(7)).

33. In addition, to show compliance with the emission standards, the facility must also: install and continuously operate a carbon monoxide or hydrocarbon

continuous emissions monitoring system (CEMS) (as well as an oxygen CEMS to continuously correct the carbon monoxide or hydrocarbon values to 7 percent oxygen as required by the HWC MACT regulations) to ensure compliance with the carbon monoxide or hydrocarbon emission limits (40 C.F.R. § 63.1209(a)(1)(i)); and continuously comply with operating limits on the feedrate of metals, chlorine and ash, key combustor operating parameters, and key parameters of the air pollution control equipment established in the facility's Documentation of Compliance (40 C.F.R. § 63.1209(j)-(o)).

34. The HWC MACT regulations also require a facility to conduct an initial comprehensive performance test within six months of placing the Documentation of Compliance in the facility's operating record (40 C.F.R. § 63.1207(c)(1)). These regulations also require a facility to submit to the EPA Administrator (or her authorized representative) for approval a site-specific test plan at least one year before the initial performance is scheduled to commence (40 C.F.R. § 63.1207(e)(1)(i)). The purpose of the initial comprehensive performance test is to document compliance with the HWC MACT emission standards and establish operating parameter limits to maintain continuous compliance with those standards. The HWC MACT regulations specify what information must be included in the comprehensive performance test plan, including, in part, a test program summary; data quality objectives (the pretest expectations of precision, accuracy, and completeness of data); an internal and external quality assurance program; a detailed description of sampling and monitoring procedures including sampling and monitoring locations in the system, the equipment to be used, sampling and monitoring frequency, and planned analytical procedures for sample analysis; a detailed test schedule for each hazardous waste for which the performance test is planned, including dates, duration, and quantity of hazardous waste to be burned; a detailed test protocol, including, for each hazardous waste identified, the ranges of hazardous waste feedrate for each feed system and the feedrates of other fuels and feedstocks, and any other relevant parameters that may affect the ability of the hazardous waste combustor to meet the emission standards; a description of, and planned operating conditions for, any emission control equipment that will be used; and procedures for rapidly stopping the hazardous waste feed and controlling emissions in the event of an equipment malfunction (40 C.F.R. § 63.1207(f)(1)(i)).

IV. Timeline for Implementation of the Court Vacatur

35. Due to the regulatory links among submitting a test plan for approval, the deadline to commence the initial comprehensive performance test, and operating in compliance with the HWC MACT standards under the Documentation of Compliance, EPA does not expect that facilities who would like to continue burning comparable fuels will be able to achieve compliance with the HWC MACT standards prior to the end of the EPA's requested six-month stay of issuance of the Court's mandate.

36. Specifically, the HWC MACT regulations, as discussed in paragraph 34, require a one year review of the comprehensive performance test plan. Operation under the Documentation of Compliance can begin no earlier than six months after the date the comprehensive performance test plan is submitted. Therefore, the earliest a facility can operate under the Documentation of Compliance would be six months after the comprehensive performance test plan is submitted. However, that six months does not include time needed for development of the numerous components of the plan (as explained in paragraph 34). Thus, even if EPA's motion for a further 6-month stay of the Court's mandate is granted, facilities will not have enough time to become an operational hazardous waste combustor under a Documentation of Compliance.

37. In addition, prior to operating under the Documentation of Compliance, a facility would need to install, certify, and continuously operate a continuous emissions monitoring system as described in paragraph 33. It is in the best professional judgement of my staff that facilities will not be able to acquire, install, and properly operate a carbon monoxide or hydrocarbons continuous emissions monitoring system (CEMS) prior to the end of EPA's requested six-month stay of issuance of the Court's mandate.

38. Specifically, the facility will need to review facility drawings, inspect the facility, and define specific constraints that include activities such as determining what monitoring locations are available and if those locations meet the monitoring location specifications, determining where sample lines could run, defining exhaust gas characteristics that will affect the CEMS (e.g., temperature, moisture, velocity, acid gas and particulate content), defining stack power requirements, determining if additional electrical power will be needed, determining exact sample port locations, and defining any other specific constraints that will affect the monitoring program. Once the CEMS technical specifications and identification of the

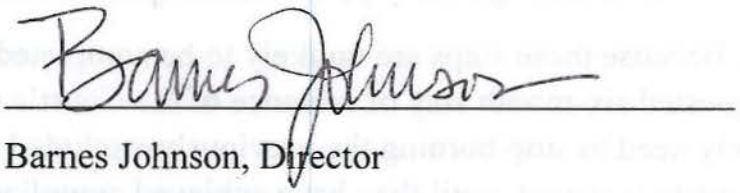
monitoring locations is completed, the facility must obtain a CEMS vendor to complete installation of support facilities and the CEMS. Activities could include building climate controlled shelters to house CEMS-related equipment, inserting new ports into the stack or duct, and building sampling platforms to support future emissions testing. Facilities will also likely need to integrate the data acquisition system for the CEMS into the plant operating system. After installation of the CEMS, the facility will conduct tests to ensure that the CEMS equipment is working properly, address any issues identified during a shakedown period, and provide training to facility workers. The facility will conduct a certification test of the CEMS installation prior to operating under its DOC to ensure that the CEMS will achieve the regulatory performance specifications for CEMS.

39. Because these steps are unlikely to be completed prior to the end of EPA's requested six-month stay of issuance of the Court's mandate, these facilities will likely need to stop burning the previously-excluded fuels when the Court's mandate is issued, until they have achieved compliance with the standards. Those facilities for which cessation of burning previously-excluded comparable fuels before the Court's mandate is issued is impractical or infeasible will be addressed administratively through EPA and/or State permitting or enforcement authorities.

40. For those facilities that stop burning the previously-excluded comparable fuels, it is in the best professional judgement of my staff that six months is a reasonable time for most facilities to complete the process of coming into compliance with RCRA requirements as a hazardous waste generator, and to initiate the administrative process to qualify for interim status or modify an existing permit, if a RCRA storage permit is necessary. In order to come into compliance as a RCRA generator, a facility must make arrangements for alternative fuel sources to replace the previously-excluded comparable fuels, contract with a hazardous waste transporter and a treatment, storage and disposal facility to manage the previously-excluded comparable fuels, and meet the RCRA generator requirements, including filing the required notification forms and other recordkeeping requirements, develop the required hazardous waste contingency plan and meet the hazardous waste emergency preparedness and prevention requirements, including arranging for employee training, and perform any necessary retrofits of tanks to ensure compliance with RCRA hazardous waste tank standards. Facilities may also need to create or upgrade other parts of the infrastructure, such as truck loading racks, to enable the materials to be transferred to trucks for shipment to a hazardous waste treatment, storage, or disposal facility. Any facilities for which compliance with

the RCRA requirements before the Court's mandate is issued is impractical or infeasible will be addressed administratively through EPA and/or State permitting or enforcement authorities.

SO DECLARED:



Barnes Johnson, Director

Office of Resource Conservation and Recovery

DATED: September 15, 2014