COMMENTS REGARDING GENERAL PERMIT CONDITIONS

EPA Region IX received many comments about specific Draft Permit Conditions and recommendations for revisions to the Draft Permit Conditions. Where appropriate, the Region incorporated the recommended changes or made its own changes to address specific concerns. Where it disagreed with the commenter, the Region did not incorporate the changes. See the Final Permit in redline format.

Pursuant to 40 CFR § 124.17, the Region is required to make available to the public a response to comments at the time that any final permit decision is issued under 40 CFR §124.15. The response to comments should specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change. It should also briefly describe and respond to all significant comments on the draft permit that were raised during the public comment period, including during any hearing. The Final Permit in redline format also reflects the Region's corrections to typographical, grammatical, and other minor errors in the Draft Permit.

The following responses to comments are organized by Commenter and are identified either by reference to the Permit Modules and its cover sheet or simply by the letter "C" for "comment."

Comments made on the Draft Permit Cover Sheet – CS- Comment #.

Comments made on the Draft Permit Modules – Module # - Comment #.

Other Public Comments – C - Comment #.

References to documents in the Administrative Record include the name of the record file (typically a "pdf" file) in quotes as the document is listed in the Administrative Record for the final Permit. The Administrative Record is available upon request to US EPA Region IX.[1] File names generally start with a date, although there are numerous exceptions.

COVER SHEET:

CS-1. One commenter recommended the deletion of language in the cover of the draft permit that expressed how the Permittees' obligations might extend beyond the life of the permit.

RESPONSE: The Region acknowledges that the fixed term of a RCRA permit is not to exceed ten years in accordance with 40 CFR § 270.50.[2] However, the Region maintains that the specific reference to the Permittees' continued obligations to perform the conditions of the Permit does not contradict this requirement:

[1] For a copy of the Administrative Record, or particular documents identified in these Responses to Comments, or other records identified in EPA's Administrative Record Index published with the final Permit, please contact Mike Zabaneh at Zabaneh.Mahfouz@epa.gov or at (415) 972-3348.

[2] See, also, Guidance on RCRA Permit Renewals, Feb. 2, 2000, RCRA Online Number: 14709 at https://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/786EEFB6524DF83385256ECA00642C3D/$file/14709.pdf.

> "All obligations for performance of the conditions of this Permit are in effect until deemed complete by the Director of the Land Division for the U.S. Environmental Protection Agency, Region 9 (the 'Director')."

Typically, if permittees wish to continue facility operations, they are obligated to submit a permit renewal application in a timely manner in accordance with the conditions of their RCRA permit 40 CFR § 270.30(b). In addition, 40 CFR § 270.51, which refers to the Administrative Procedures Act[3] for its due process requirements, specifies that the conditions continue in full force until the effective date of a new permit.[4]

When the permittees desire to cease operations, they are required to give notice to the permitting authority and implement their closure plan.[5] After closure and any corrective action activities are completed, if applicable, permittees may choose to seek a permit modification in order to shorten the permit term to allow for its earlier termination.[6]

However, if, for whatever reason, a RCRA permit expires before the permittees' obligations – such as the obligation to perform closure of the facility – have been deemed complete, the permittees may not then escape obligations that RCRA imposes for proper closure and corrective action at the facility. See, *e.g.*, RCRA Section 3004(u).[7] This would be especially true where, for example, the permittees themselves secured the premature expiration of the permit by failing to file a timely renewal application.

In its *In re GMC Delco Remy* decision, EPA's Environmental Appeals Board expressed a similar sentiment, as follows:

> "Once the owner or operator of a facility receives a permit for treating, storing or disposing of hazardous waste, it makes no sense to say that the permittee can simply unilaterally abandon ongoing corrective action responsibilities whenever it finds it expedient to discontinue the activities that prompted it to obtain a permit in the first instance. While it may be true in some cases that a permit would no longer be required for the discontinued hazardous waste management activity, the same would not necessarily be true of pending corrective action." 7 E.A.D. 136, at 147-148, (RCRA Appeal No. 95-11, June 1997).[8]

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[3] 5 USC § 558.

[4] 40 C.F.R. § 270.51(b) states that "Permits continued under this section remain fully effective and enforceable."

[5] See 40 CFR § 264.113.

[6] See, *e.g.*, Guidance on RCRA Permit Renewals, referenced above in footnote (fn.) 2.

[7] RCRA Section 3004(u) directs EPA to require owners and operators to take "corrective action for ***all*** releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility . . . regardless of the time at which waste was placed in such unit." 42 USC § 6924(u), (emphasis added). See also 40 CFR § 264.112(d)(3): "If the facility's permit is terminated, or if the facility is otherwise ordered. . . to cease receiving hazardous wastes or to close . . . the owner or operator must close the facility in accordance with the deadlines established in §264.113."

[8] The EAB delves into further detail regarding the legislative history of RCRA's Hazardous and Solid Waste Amendments (HSWA) in examining the issue of ongoing corrective action obligations and the basis for the duty reflected there: "The legislative history of the HSWA makes it clear Congress intended the amendments to subject all RCRA permitted facilities to corrective action regardless of their active status," citing to the House Conference

Another possible scenario where continuing obligations may extend beyond the life of any RCRA permit could be where institutional controls are included as part of any corrective action remedy. See, e.g., Handbook: Implementing Institutional Controls in Indian Country, US EPA Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance, November 2013 at https://www.epa.gov/enforcement/handbook-implementing-institutional-controls-indian-country.

The language to which the commenter objects accurately expresses the Permittees' continuing obligations to complete performance of permit conditions that are not deemed completed upon permit expiration. The Region will not delete the language as suggested by the commenter.

MODULE I:

I-1. One commenter requested clarification of the roles of each of the Permittees in terms of their respective obligations under the Permit and suggested that the Colorado River Indian Tribes as the beneficial landowner not be identified throughout the Permit as a Permittee with operator-related obligations.

RESPONSE: The Region disagrees. Neither RCRA Section 3004 nor the regulations promulgated pursuant to RCRA's hazardous waste provisions distinguish permittees based on whether they are the owner versus the operator. 40 CFR § 270.1(c) requires that both owners and operators of hazardous waste management units have permits during the active life (including the closure period) of the unit. While facility owners and operators may agree between themselves which will be primarily responsible for compliance, and while compliance by one in nearly all cases constitutes compliance by both, the Region will not identify the permittees as anything other than co-equals. The Region will not make changes to the term "Permittees," which appears throughout the final permit.

I-2. One commenter suggested revisions to the draft permit's "permit as a shield" language in draft permit conditions I.A.1. and I.A.4. The commenter asserted that the language in these draft permit conditions does not correctly track the language in 40 CFR § 270.4(a)(1) and did not sufficiently convey the permit shield protection that it believed the Permittees are entitled to. The commenter suggested that the Region incorporate the "permit as a shield" language from a recently-issued draft RCRA permit to another permit applicant (June 2016 draft permit for Envirosafe Services of Ohio, Inc.) (the "Envirosafe Permit").

RESPONSE: The Region made some -- but not all -- of the suggested modifications to Permit conditions I.A.1 and I.A.4. The Region is not obligated to utilize permit language that other Regions have proposed. 40 CFR § 270.4 does not provide a defense to an EPA enforcement action, but rather sets forth the "permit as a shield provision" and its exceptions.

Report, H. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 92 (Oct. 3, 1984), reprinted at 1984 U.S.C.C.A.N. 5649, 5663, and the Senate Report, S. Rep. No. 284, 98th Cong. 1st Sess. 31-32 (Oct. 28, 1983). *GMC Delco Remy*, 7 E.A.D. 136, at 148.