IN RE NATIONAL CEMENT COMPANY OF CALIFORNIA, INC. AND SYSTECH ENVIRONMENTAL CORPORATION

RCRA Appeal Nos. 94-5, 94-6

ORDER DENYING REVIEW

Decided July 22, 1994

Syllabus

National Cement Company of California, Inc. and Systech Environmental Corp. have filed separate petitions asking the Environmental Appeals Board to review the decision of Region IX denying National's application for a RCRA permit. The permit is for National's cement manufacturing plant in Lebec, California. The facility, which uses hazardous waste as a supplemental fuel, is regulated under the Boilers and Industrial Furnace Rule ("BIF Rule"). 40 C.F.R. § 270.66; 56 Fed. Reg. 7134 (February 21, 1991). The land on which National's facility is located is owned and leased to National by Tejon Ranchcorp. Tejon has no involvement in the operation of the facility. National's permit application originally did not include Tejon's signature. Because Tejon owns the land on which the plant is located, however, the Region regarded Tejon as an owner of the facility and concluded that National's application would not be complete without Tejon's signature and a certification statement containing the language set forth in section 270.11(d). Tejon ultimately signed National's permit application, but it refused to sign the certification statement required under section 270.11(d). After repeated extensions of time to allow National to resolve this problem with Tejon, the Region denied National's permit application as incomplete because it lacked the requisite certification statement from Tejon.

National and its supplier of hazardous waste, Systech Environmental Corp., have filed separate petitions challenging this decision. Their arguments follow: (1) The certification requirement does not apply to "absentee landowners" like Tejon that do not take part in the operation of the facility; (2) Even if a literal application of section 270.11(d) requires that absentee landowners sign the certification statement, the requirement is inappropriate as applied to such owners and the Agency should exempt such owners using its inherent authority to relax inappropriate procedural requirements when justice so requires; (3) National's permit application is complete without Tejon's signature, so even if Tejon is required to sign a certification statement, the proper remedy is not denial of National's permit application but enforcement against Tejon for not filing its own application; (4) National, and not Tejon, should be considered the landowner, since National holds a 99-year lease from Tejon and possesses other incidents of ownership; (5) the policies that motivated Congress to pass RCRA would be undermined by closing down National's facility over a minor procedural technicality like the certification requirement; (6) the Agency is estopped from denying National's permit application because in the past it has accepted applications that do not have the signatures of absentee landowners; and (7) denial of National's application violates the takings clause, the contract clause, and the due process clause of the U.S. Constitution, because it effectively prevents lessee's from obtaining RCRA permits.

Held: (1) the Region was not clearly erroneous in its determination that any person signing a permit application on behalf of Tejon must also sign a certification statement under 40 C.F.R. § 270.11(d); (2) the Region was not clearly erroneous in determining that the absence of Tejon's certification statement in National's permit application rendered that application incomplete and in denying the permit application on that basis; (3) none of the additional arguments made by National warrant review. Because National has not demonstrated that the Region's decision is based on clearly erroneous factual or legal conclusions or involves important policy considerations warranting review, the Board is denying review of National's petition. For the same reasons, the Board is also denying review of Systech's petition.

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

Opinion of the Board by Judge Reich:

Before us are two petitions seeking review of U.S. EPA Region IX's decision to deny an application submitted by National Cement Company of California, Inc. ("National") for a permit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, for National's cement manufacturing facility. The facility, which uses hazardous waste as a supplemental fuel, is regulated under the Boilers and Industrial Furnace Rule ("BIF Rule"). 40 C.F.R. § 270.66; 56 Fed. Reg. 7134 (February 21, 1991). Although California has been authorized under section 3006 of RCRA, 42 U.S.C. § 6926, to administer most aspects of the RCRA program in lieu of the federal program, National's permit application was handled by EPA in this case because California has not yet been authorized to implement the BIF Rule.

For the reasons set forth below, we conclude that the petitions have failed to demonstrate that the denial of National's permit application was based on any clearly erroneous finding of fact or conclusion of law or involves any policy considerations or exercises of discretion that warrant review. Accordingly, we are denying review of the petitions.

I. *BACKGROUND*

The facility at issue here is a cement manufacturing plant located near Lebec, California. The land on which National's plant is located is owned and leased to National by Tejon Ranchcorp ("Tejon"). The cement manufacturing plant has been in operation since 1967 and has been owned by National since 1987.

National uses certain liquid wastes such as used oils and organic solvents as a supplemental fuel "to offset the high cost of fuel." National's Petition for Review of RCRA Permit Denial at 4. These supplemental fuels are unquestionably "hazardous wastes" under RCRA. *Id.*

at 4. National obtains such wastes from Systech Environmental Corp., which is located near the National facility on land also owned by Tejon under a sublease from National. By using these hazardous wastes as a supplemental fuel, National eliminates the need to use as much as 10 million gallons of crude oil a year. *Id.* at 5.

Before August 21, 1991, certain cement kilns and other burners of hazardous waste, including National's, were exempt from federal RCRA regulations governing the incineration of hazardous wastes. On that date, however, the Agency began regulating such facilities under the BIF Rule. The BIF Rule requires cement kilns that burn hazardous waste to obtain RCRA permits. Because National's facility was in existence on the date the BIF rule took effect, the facility was allowed to continue to operate without a permit under "interim status," by submitting Part A of its permit application in August of 1991.[1] Section 3005(e) of RCRA, 42 U.S.C. § 6925(e); 40 C.F.R. § 270.70(a).

On September 6, 1991, however, Region IX notified National that it was required to submit part B of its application for an operating permit, and National did so in December of 1991. Although Tejon owns the property on which National's facility is situated, National signed its permit application as both the facility owner and operator. After reviewing the application, the Region noted that it had not been signed by Tejon, and sent National a notice of deficiency ("NOD"), dated August 26, 1992, formally notifying National that its application was incomplete because, among other reasons, it lacked Tejon's signature and giving National 60 days to correct the deficiency. While Tejon does not participate in the operation of the facility, the Region indicated that as the owner of the land on which the facility is located, Tejon is regarded as an "owner" of the facility for purposes of the RCRA permitting regulations. More specifically, under RCRA, the owner of a facility, even one that does not participate in the operation of the

[1] To obtain an operating permit, a hazardous waste management facility must file a permit application consisting of part A and part B. Part A is a short form containing certain basic information about the facility, such as the facility name, location, nature of business, regulated activities, and a topographic map of the facility site. 40 C.F.R § 270.13. Part B requires substantially more comprehensive and detailed information that demonstrates compliance with the applicable technical standards for hazardous waste management facilities. 40 C.F.R. § 270.14. New facilities must submit part A and part B at the same time. 40 C.F.R § 270.10(f)(1). An existing hazardous waste management facility (*i.e.*, one that was in existence on November 19, 1980 or one that was in existence on the date of any statutory or regulatory change that makes the facility subject to RCRA), however, need only notify EPA of its hazardous waste management activity and file part A to obtain interim status and continue operations. 40 C.F.R §§ 270.10(e) & 270.70(a). Existing facilities that have already filed part A to gain interim status, must submit part B in accordance with any applicable statutory deadline or earlier if requested by EPA or an authorized State. 40 C.F.R § 270.10(a) ("Persons currently authorized with interim status shall apply for permits when required by the Director.").

facility, is required to apply for a permit along with the operator of the facility. *See* 40 C.F.R. § 270.10(b) ("*Who applies?* When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, *except that the owner must also sign the permit application.*") (emphasis added).

As noted above, the NOD gave National 60 days to correct the signature deficiency and other deficiencies identified in its application. Thereafter, the Region extended the deadline on three separate occasions in response to National's requests (the last extension ending on March 31, 1993), because National had represented that it was close to concluding negotiations with Tejon to purchase the land on which the facility is located. Finally, on October 14, 1993, after giving National more than a year to submit a complete application, the Region issued its proposal to deny National's application not only because it lacked Tejon's signature on the application under 40 C.F.R. § 270.10(b) but also because it lacked a certification by Tejon under 40 C.F.R. § 270.11(d). Under section 270.11(d), when a business entity applies for a RCRA permit, the individual signing the application on behalf of the business is required to sign a statement certifying that the permit application was prepared under the supervision and direction of the signer and that it is true and accurate and complete to the best of his or her knowledge.

In response to the proposed permit denial, Tejon submitted a comment on November 3, 1993, stating that it could not provide the certification required by the regulations because the National permit application was not prepared under its "direction or supervision" and it had "no basis to certify to the truth and accuracy or completeness of the application as required by your regulations." Petition for Review, Exhibit 8 (Letter from Jack Hunt, President, Tejon Ranchcorp, to Jeffrey Zelikson, Director, and Vern Christianson, Hazardous Waste Division, Region IX (November 3, 1993)). National also submitted comments both during and after the comment period. The last of these comments, submitted on February 24, 1994, included Tejon's signature as a supplement to part A and part B of National's application. This resolved the deficiency relative to Tejon's lack of signature on the application. However, the Region still did not consider the application complete. This is because Tejon had not signed the certification statement set forth in section 270.11(d), but had instead submitted an "alternative" certification statement, which acknowledged Tejon's joint and several responsibility for compliance with the regulations and permit requirements, but did not use any of the language set forth in section 270.11(d). The Region deemed this alternative certification statement inadequate and on March 31, 1994, issued its final permit deci-

sion denying National's permit application as incomplete. The Region's denial was based solely on the lack of Tejon's certification.

National and its supplier of hazardous waste, Systech Environmental Corp., have filed separate petitions challenging this decision.[2] Because National's petition raises all of the arguments raised in Systech's petition plus others and because National's arguments are presented in a more thorough fashion, the following discussion focuses on National's petition, but it applies to both petitions. The arguments raised in National's petition are as follows: (1) The certification requirement does not apply to "absentee landowners" like Tejon that do not take part in the operation of the facility; (2) Even if a literal application of section 270.11(d) requires that absentee landowners sign the certification statement, the requirement is inappropriate as applied to such owners and the Agency should use it inherent authority to relax inappropriate procedural requirements when justice so requires; (3) National's permit application is complete without the Tejon's signature, so even if Tejon is required to sign a certification statement, the proper remedy is not denial of National's permit application but enforcement against Tejon for not filing its own application; (4) National, and not Tejon, should be considered the landowner, since National holds a 99-year lease from Tejon and possesses other incidents of ownership; (5) the policies that motivated Congress to pass RCRA in the first place would be undermined by closing down National's facility over a minor procedural technicality like the certification requirement; (6) the Agency is estopped from denying National's permit application because in the past it has accepted applications that do not have the signatures of absentee owners; and (7) denial of National's application is a taking of National's property without just compensation and a violation of National's rights under the due process clause and the contract clause.

II. *DISCUSSION*

Under the rules governing this proceeding, the denial of a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See*

[2] In addition, the Desert Citizens Against Pollution ("DCAP") filed for leave to file an amicus brief, supporting the Region's decision to deny the permit application. Leave to file the brief is hereby granted, and DCAP's brief is hereby accepted. In its brief, DCAP argues that, when an owner and operator jointly file an application, the regulations require that the owner sign the application and provide the certification statement set forth in section 270.11(d). DCAP argues that "[t]he certification ensures that the landowner has actively participated in the preparation of the permit application, and thus enhances compliance with permit standards such as security, emergency preparedness, closure, and corrective action." Brief Amicus Curiae of Desert Citizens Against Pollution at 2.

40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the petitioner. *See, e.g., In re Metalworking Lubricants Company*, RCRA Appeal No. 93-4, at 3 (EAB, Mar. 21, 1994); *In re Amoco Oil Company, Mandan, North Dakota Refinery*, RCRA Appeal No. 92-21, at 4 (EAB, Nov. 23, 1993).

In the discussion below, we first consider whether an absentee landowner like Tejon that is required to sign a permit application is required to sign the certification statement set forth at section 270.11(d). We conclude that the Region was not clearly erroneous in determining that such an owner is required to sign the certification statement. We then consider whether the Region properly denied the permit application because Tejon had not provided such a certification statement. We conclude that the Region was not clearly erroneous in determining that the application was incomplete because it lacked the certification statement and that the permit therefore should be denied. Finally, we consider National's additional arguments as to why the Agency's permitting requirements should not be followed in this case. We conclude that none of those arguments involves a legal or factual error or important policy matter that should be reviewed by the Board. Accordingly, we are denying review of National's petition. For the same reasons, we are denying Systech's petition as well.

A. *The Application of Sections 270.10(b) and 270.11(d) to Absentee Landowners*

Under section 270.11(d), a person who signs a permit application under paragraph (a) of that section must also submit the following statement with the application:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to be [sic] the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

40 C.F.R. § 270.11(d). The central issue in this case is whether the obligation to sign the above-quoted certification extends to an absentee landowner required to sign a permit application in accordance with paragraph (a). As a threshold issue, however, we consider first whether the absentee landowner in this case, Tejon, is in fact required to sign a permit application. For the following reasons, we conclude that it is.

Tejon is an owner of the real property on which the facility is located.[3] The real property on which the facility is located is considered part of the facility.[4] An owner of part of a facility is deemed under

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[3] National argues that Tejon would not be considered an owner for purposes of the application requirement under the Agency's own Regulation Interpretation Memorandum ("RIM") (122-80-1), which was issued to clarify "what persons are considered owners of facilities for signatory purposes." 45 Fed. Reg. 74489, 74490 (Nov. 10, 1980). The key provision of the RIM for our purposes reads as follows:

> Therefore, solely for the purpose of this regulation, 40 C.F.R. 122.4(b) [which became 270.10(b) after deconsolidation], the Agency will interpret the term "owner" so as to exclude those who both hold bare legal title for the purpose of providing a security for a financing agreement, and do not exercise any of the effective incidents of ownership or equitable title.

Id. National argues that Tejon's interest in the real property on which the facility is located is analogous to bare legal title held for purposes of providing security for a financing agreement and should be treated similarly. We disagree. Tejon's interest in the property is not even vaguely analogous to the situation described in the quoted passage. For one thing, the lease is not a financing agreement. Unlike a mortgagee, following the expiration of the lease, Tejon will retain exclusive ownership and control of the property. The Agency has consistently taken the position that landowners awarding long-term leases remain owners subject to the permitting requirements. 47 Fed. Reg. 32038 (July 23, 1982) (99-year leases); *see also In re Waste Technologies Industries, East Liverpool, Ohio*, RCRA Appeal Nos. 92-7, *et alia*, at 4 (EAB, July 24, 1992) (Order Denying Review in Part and Remanding in Part) ("long term lease"); *In re Hawaiian Western Steel, Limited, Inc. and James Campbell Estate*, RCRA (3008) Appeal No. 88-2, at 1 (Adm'r, Nov. 17, 1988) (Order Denying Petition for Reconsideration on Interlocutory Appeal) (55-year lease). Moreover, Tejon holds more than bare legal title to the property. Tejon exercises incidents of equitable title as well. Specifically, Tejon receives compensation from National under the lease, receives royalty payments for each barrel of cement produced by National, and retains certain other rights under the lease, including: (1) the right to access the property to review records and ensure compliance with the lease; (2) the right to restrict National's use and disposal of water; (3) the right to use or allow others to use portions of the leased property for farming and grazing; (4) the right to restrict National from extracting materials, other than those needed to make cement; and (5) the right to terminate the lease and take back possession of the property under certain specified conditions. Under the circumstances, we conclude that the passage quoted above does not apply to Tejon.

[4] The term "facility" is defined as "*all contiguous land*, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." 40 C.F.R. § 260.10 (emphasis added).

the rules to be an owner of the facility.[5] Owners of facilities are required to have permits.[6] This is true even for "absentee owners," like Tejon, who have nothing to do with the operation of the facility.[7] Section 270.10(a) provides that "[a]ny person who is required to have a permit * * * shall complete, *sign*, and submit an application to the Director * * *." 40 C.F.R. § 270.10(a) (emphasis added). The term "person" includes corporations such as Tejon.[8] Thus, Tejon is unquestionably required to sign a permit application.[9]

We now turn to the issue of whether Tejon is also required to sign the certification statement quoted above. Section 270.11(d) provides that: "*Any* person signing a document under paragraph (a) or (b) of this section shall make the following certification: [certification statement quoted above]." (Emphasis added.) Paragraph (a) in turn provides in pertinent part as follows:

(a) *Applications.* All permit applications shall be signed as follows:

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[5] 40 C.F.R. § 260.10 ("Owner" defined as "the person who owns a facility *or part of a facility.*") (emphasis added).

[6] 40 C.F.R. § 270.1(c) provides, inter alia, that "[o]wners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit." This section implements RCRA § 3005(a), which obligates the Administrator to promulgate regulations "requiring *each person* owning or operating [a hazardous waste facility] to *have* a permit * * *." 42 U.S.C. § 6925(a) (emphasis added). It is therefore settled that the regulations implementing RCRA, including section 270.10(b), "treat[] landowners as persons who, along with the operator of a hazardous waste facility, [are] required to have a permit." *In re Waste Technologies Industries, East Liverpool, Ohio*, RCRA Appeal Nos. 92-7, *et alia*, at 7 (EAB, July 24, 1992); *see also In re Hawaiian Western Steel Limited, Inc., et al.*, RCRA (3008) Appeal No. 88-2 (Adm'r, Nov. 17, 1988); *In re Arrcom, Inc., Drexler Enterprises, Inc., et al.*, RCRA (3008) Appeal No. 86-6, at 8 (CJO, May 19, 1986). For a complete discussion and analysis of RCRA § 3005(a) and the regulations implementing the permitting requirement, *see In re Hawaiian Western Steel Limited, Inc., et al., supra.*

[7] *See In re Aarcom, Inc., Drexler Enterprises, Inc., et al.*, RCRA (3008) Appeal No. 86-6, at 8 (CJO, May 19, 1986) ("RCRA does not link the duty to obtain a RCRA permit to the extent of the owner's knowledge or control of the facility.").

[8] The term "*person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 270.2.

[9] National argues that it should be regarded as the owner of the land rather than Tejon, because it holds a 99-year lease and other incidents of ownership, and thus Tejon's signature as an additional "owner" is not required. For purposes of determining whether Tejon is required to sign National's permit application, however, the question of whether National could also be considered an "owner" of the land is irrelevant. Tejon clearly remains an owner of the land (*see supra* n.3), and thus its signature and certification must be included in National's permit application. This is true even if National is also considered an owner. *See* 45 Fed. Reg. 33169 (May 19, 1980) ("EPA considers the owner *(or owners)* and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements of [RCRA].") (emphasis added).

> (1) *For a corporation*: By a responsible corporate officer. For the purpose of this section, a responsible corporate officer means (i) A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decisionmaking functions for the corporation, or (ii) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

40 C.F.R. § 270.11(a). Paragraph (a) applies to the signatures on "all permit applications," drawing no distinction between those of the owner and the operator. Thus, we conclude that, under the plain language of section 270.11, Tejon must also sign the certification statement set forth at paragraph (d) of that section. Of course, as a corporation, Tejon "signs" the certification through a responsible corporate officer, as provided in section 270.11(a)(1).

This interpretation of section 270.11 is consistent with the regulatory history of the certification requirement. An earlier version of the certification requirement was promulgated as part of the consolidated permit regulations, which applied to UIC, PSD, NPDES, and section 404 dredge and fill permits as well as RCRA permits. 45 Fed. Reg. 33290 (May 19, 1980) (consolidated permit regulations). That version of the certification requirement, which called for a greater familiarity with facility operations than the current version, reads as follows:

> I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

45 Fed. Reg. 33425 (May 19, 1980) (40 C.F.R. § 122.6(d)). Later, as part of a settlement agreement in litigation over the Consolidated Permit Regulations, the Agency proposed (but as discussed *infra* never promulgated) an alternative certification statement specifically designed

for absentee landowners of RCRA facilities. 47 Fed. Reg. 32038, 32040 (July 23, 1982). This special certification statement would have required only that the absentee landowner acknowledge its joint and several responsibility for compliance with the permit and regulations.[10] In the preamble to the proposed certification amendment, the Agency explained that it was proposing this alternative certification statement for absentee landowners because of concerns that the general certification was unduly burdensome for such owners:

> [The certification requirement] can be quite burdensome for owners who are not also operators. In large corporations and government agencies, it may be impossible for the person signing the permit application as an owner but not an operator, to personally examine every permit application, or to question all the individuals responsible for obtaining the information. Therefore, EPA is proposing an alternate certification to the one quoted above, that may be used by an owner when the owner and the operator are not the same person.

Id. at 32041-32042. The proposed alternative certification statement for RCRA absentee landowners was never adopted, and we can find nothing in the regulatory history explaining why. We note, however, that the language of the certification statement applicable to all permit applicants was modified in 1983 to make it less burdensome on corporate executives by eliminating the need to personally examine and be familiar with all of the information in the application and its attachments. 48 Fed. Reg. 39612-39613 (September 1, 1983). This less burdensome version is the one in effect today. 40 C.F.R. § 270.11(d).

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[10] The proposed alternative certification would have provided as follows:

> I certify that I understand that this application is submitted for the purpose of obtaining a permit to operate a hazardous waste management facility on the property as described. As owner of the property/facility, I understand fully that the facility operator and I are jointly and severally responsible for compliance with both the regulations at 40 C.F.R. Parts 122, 264, 265 and 267, and any permit issued pursuant to those regulations.

Id.

Perhaps, the adoption of this less burdensome version influenced the Agency to abandon its proposal to adopt a special certification statement for absentee landowners of RCRA facilities.[11]

In view of the foregoing, it is clear that even though the Agency believed that the old certification statement may have been "burdensome" for absentee owners, the Agency also recognized that, without a rule change, absentee landowners were subject to that requirement. This is clear not only from the fact that the Agency proposed (but never adopted) a rule change to correct the problem, but also from Agency statements in the preamble to the proposed changes: "To ensure this knowledge [of the absentee landowner's joint and several responsibility for compliance with the permit and regulations], the owner is required to sign the permit application *and certify familiarity with the information contained therein*." 47 Fed. Reg. 32038, 32039 (July 23, 1982)(emphasis added). Thus, the regulatory history of the certification requirement supports the conclusion that absentee landowners are subject to the certification requirement at section 270.11(d).

Requiring an absentee landowner to sign a certification statement also makes sense from a policy standpoint. When an absentee landowner allows an operator to engage in hazardous waste management activities on its property, it assumes significant responsibility for compliance with the permit and the RCRA regulations. Congress and the Agency have recognized the importance of making absentee landown-

[11] In its reply brief, National makes much of the fact that, when the new certification statement was adopted, the Agency expected to adopt a separate certification statement for absentee landowners of RCRA facilities. *See* 48 Fed. Reg. 39611, 39613 (Sept. 1, 1983) ("It should be noted that the HWM program has proposed amendments to § 270.11(d) (formerly § 122.6(d)) which contain additional procedures for owners and operators of HWM facilities (see 47 FR 15304, April 8, 1982 and 47 FR 32038, July 23, 1982)."). On that basis, National concludes that the current version of the certification statement was never meant to apply to absentee landowners. We disagree. As noted in the text, the old version of the generally applicable certification statement applied to absentee landowners of RCRA facilities even though a special version for such landowners was being proposed. The adoption of the new version of the certification statement had the limited effect of changing the wording of the generally applicable certification statement, but it did not change the language defining the applicability of the certification requirement (*i.e.* "[a]ny person signing a document under section (a) or (b) of [Section 270.11]."). Thus, when the new version of the generally applicable certification statement became effective, anyone subject to the old version automatically became subject to the new version. While the Agency might at one time have contemplated that absentee landowners would not be subject to the general certification but rather to a separate certification instead, it never completed the rulemaking which would have effectuated that result.

ers aware of this responsibility.[12] The more a landowner understands about its responsibilities, the more likely that it will seek to minimize its potential liability by helping ensure compliance with the permit and RCRA regulations. Requiring the landowner to sign the permit application, therefore, is important because the landowner is thereby reminded that it is jointly and severally responsible for compliance with the permit and RCRA regulations.

But merely requiring the landowner to sign the permit application is not enough, for without any knowledge of the activities being carried out on its property the landowner will have little appreciation of the nature and extent of the liability it is assuming. When the landowner signs a permit application, therefore, its signature will only be meaningful if it has some understanding and appreciation of the nature of the operations at the facility. The certification requirement ensures that the landowner will gain such an understanding by requiring it to participate in the supervision and direction of the preparation of the application and by requiring it to certify to the truth and accuracy of the application. Knowledge of facility operations gained through its participation in the application process will then give the landowner not only the incentive but also the means to play a meaningful role in ensuring compliance with the permit and RCRA regulations. Thus, the certification requirement plays an important role in the permitting scheme by helping to ensure compliance with the permit and RCRA regulations.

Despite the plain, unambiguous language of the regulation and its policy justification, National raises several arguments as to why that regulation should nonetheless be interpreted in a manner that relieves an absentee landowner from the obligation to sign a certification. First, it argues that the language of the certification statement itself contemplates that the statement will be signed only by the preparer of the application. It contends that an absentee landowner cannot meaningfully participate in the preparation of the application since it has no knowledge of facility operations. It argues, therefore, that it does not

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[12] *See* 45 Fed. Reg. 33169 (May 19, 1980) (Consolidated Permit Regulations):

> Some facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility.

make sense to interpret the certification requirement as applying to absentee owners.

Second, National argues that the Region's interpretation of section 270.11(d) would nullify the effect of section 270.10(b), which provides as follows:

> *Who applies?* When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application.

40 C.F.R. § 270.10(b). National reads section 270.10(b) as relieving absentee owners of the responsibility for preparing permit applications and placing that responsibility solely on the operator. National believes that the Region's interpretation of section 270.11(d) renders this division of responsibility meaningless by forcing absentee owners to take a significant role in the preparation of the application.

For the following reasons, however, we believe that both of these arguments are based upon a misconception of the role that an absentee owner is required to play under the certification provision. We conclude that, properly understood, that role is not overly burdensome for absentee owners, nor is it inconsistent with the division of responsibilities established in section 270.10(b).

National focuses on the first sentence of the certification statement, in which the signatory is required to state that the permit application was "prepared under my supervision or direction * * *." National argues that the language requires a level of knowledge of the facility and involvement in the application process that would be impossible for absentee owners to achieve and inconsistent with the division of responsibility contemplated in section 270.10(b). When this language is viewed in its proper context, however, it becomes apparent that such a reading is unjustified.

At the outset, we emphasize that section 270.11(d) does not change the fact that the operator will take the lead in establishing the process by which the application is prepared. As contemplated by section 270.10(b), the operator is in the best position to play this role, since its employees are familiar with facility operations. Given this reality, there is no expectation that the landowner will participate in the process to the same extent as the operator, and section 270.11(d) does not compel it to do so.

The certification statement clearly contemplates that the person certifying will not necessarily be the person who compiles the application but may rather be a high level executive not personally involved. Thus, the certification envisions that there will be a system "designed to assure that qualified personnel properly gather and evaluate the information submitted." 40 C.F.R. § 270.11(d). The person signing the certification can satisfy his or her burden based on inquiries of those directly involved. However, those persons preparing the application must be under the direction or supervision of the person signing the certification.

Normally, we would expect that any such "system" would be essentially managed by the operator, as the party primarily responsible for developing the application. However, this does not mean that the landowner cannot participate in the application process as well. The landowner can appoint someone (for example, an outside consultant or an employee of the landowner), who would then familiarize him or herself with facility operations and work with appropriate representatives of the operator in supervising and directing the application process.[13] This person would be supervised and directed by the landowner. The landowner could then question this person or any others involved in the process to ascertain whether qualified personnel were being hired and proper data gathering and evaluation techniques were being used. If, after such inquiries, the landowner is satisfied with the integrity of the application process and if the landowner does not know or have reason to know of any inaccuracies in the application, he or she will be in a position to certify that "to * * * the best of [his or her] knowledge and belief" the application is "true, accurate, and complete." These are all matters that the landowner and the operator can arrange for contractually—for example, by executing a new lease, or

[13] This approach is suggested in the Agency's brief:

> In addition, the current certification allows the signer to base his certification on an inquiry of those persons who manage a system designed to assure qualified persons gather and evaluate the information submitted. Accordingly, Tejon, for example, could have appointed someone to familiarize himself with facility operations and to work with appropriate National representatives in supervising or directing the gathering of the information submitted with the application and the preparation of the application. There are a number of ways in which Tejon could have set up a system to assure itself that the information met the standard set forth in the required certification.

EPA's Response to Petitions for Review of RCRA Permit Denial at 27.

amending an existing lease, or entering into a separate side agreement outside the main lease instruments.[14]

Thus, it is readily apparent that, contrary to National's argument, the certification statement does not require a level of involvement in the application process that would be unduly burdensome or impossible for an absentee landowner to achieve.[15] It is also apparent that the role of absentee landowners under the certification statement is not inconsistent with the division of responsibility established under section 270.10(b). The "supervision or direction" contemplated in the certification statement does not require the landowner to take the lead in preparing the application (*i.e.*, the gathering, evaluation and presenting of information concerning the facility's operations). Primary responsibility for the actual preparation of the application remains with the operator and is unaffected by section 270.11(d). Section 270.11(d) merely requires that the absentee owner exercise enough oversight over the application process to have confidence in the integrity of the document he or she is signing.

National also argues that Tejon cannot sign the certification statement without perjuring itself because, by its own admission, it did not take any part in the preparation of the application process. We have trouble sympathizing with National's complaint, since the "Hobson's choice" Tejon supposedly faces is a self-imposed constraint arising from the way the parties have chosen to structure their relationship.

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[14] National seems to regard the need for such owner/operator coordination as an insurmountable problem, arguing that section 270.11(d) does not contemplate a joint certification statement signed by more than one person. We see no reason, however, why this should be a problem. Each party can simply sign its own certification statement. In general, we would assume that such coordination would go smoothly. Given the operator's strong incentive to encourage the owner's involvement, the operator in all probability will be ready to do whatever it can to ensure that the signatory for the owner can fulfill the duties contemplated in the certification statement.

[15] The Agency's brief suggests two ways in which absentee landowners could remove any element of uncertainty concerning the proper interpretation of the supervision requirement in the certification statement. First, the Agency has suggested that the owner may attach to its certification statement a description of exactly what it did to supervise and direct the application process. In that manner, the owner could make clear what it meant by the terms supervise or direct when it signed the certification statement. If the Region then concluded that the supervision and direction described by the owner did not reach the level contemplated in the certification statement, the Region could issue a notice of deficiency; however, it would not be able to charge the owner with misleading the government. Second, the Agency has suggested its willingness to advise in advance whether an absentee landowner's interpretation of the supervise or direct language corresponds to the Agency's. Thus, before submitting the application, the owner could send the Region a description of its proposed involvement in the application process. The Region would then issue an informal opinion letter either taking a position on the adequacy of the level of involvement described by the owner or refraining from taking a position because the description did not provide sufficient information. EPA's Response to Petitions for Review of RCRA Permit Denial at 27.

Even before National received its NOD from the Region, dated August 26, 1992, National and Tejon had reason to expect that the Agency would regard the lack of Tejon's certification as a deficiency in the application.[16] Before National began preparation of the application, therefore, it knew or should have known that Tejon would be expected to sign a certification statement. Accordingly, National could have made provision contractually for Tejon's participation in the application process. If it was unable to reach an appropriate accord with Tejon, that failure rather than any regulatory barrier constitutes the real reason for having the permit application denied. Under the circumstances, National cannot be heard to complain about Tejon's supposed "dilemma." Any unwillingness or inability on the part of Tejon to furnish the requisite certification is the direct result of the failure of National and Tejon to structure their relationship such that Tejon was in a position to (and, in fact, mandated to) take part in the application process so as to allow it to submit the necessary certification.

For all the foregoing reasons, we are not persuaded that the plain, unambiguous language of section 270.11(d) can be read so as to relieve an absentee landowner of the obligation to sign a certification statement.[17] The language of the regulation, the history of the regula-

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[16] This is because the same problem arose in the permit proceedings involving Systech, National's hazardous waste fuel supplier. Systech's facility is also located on land owned by Tejon under a sublease from National. On April 29, 1991, the Agency sent Systech an NOD citing the lack of Tejon's signature and certification as a deficiency in Systech's application. (Before the State of California became authorized to administer its own RCRA program, the Agency had begun to process Systech's application for a RCRA permit.) In the fall of 1991, at the request of Systech, the Region's representatives met with representatives from Systech, National and Tejon to discuss the NOD. At that time, the Region agreed to consider the possibility of accepting alternative certification language, and the Region later proposed such language itself; however, during these discussions, the Region made it clear that it was bound by the language of the regulations and was unaware of any legal authority that would allow it to accept alternative language. *See, e.g.*, Letter from Gene A. Lucero, Counsel for Systech, to Brian Grant and Jo Ann Asami, of EPA, at 8 (January 8, 1992) ("You stated that our proposal for EPA to adopt alternative certification language was your preferred solution to the NOD. *However, you claimed that the agency is bound to its own regulations which prescribe particular certification language.*") (emphasis added). Although the Systech discussions were eventually abandoned for several reasons, they are significant for our purposes because they demonstrate that Tejon and National were on notice concerning the certification issue.

[17] To the extent that National's arguments constitute a challenge to the regulation itself, this RCRA permit proceeding is not the appropriate forum for considering challenges to applicable regulations. *See In re Ford Motor Company, et al.*, RCRA Appeal Nos. 90-9, 90-9A, at 8 n.2 (Adm'r, Oct. 2, 1991) ("Section 124.19, which governs this appeal, authorizes me to review contested permit conditions, but it is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations."). *Cf. In re J & L Specialty Products Corp.*, NPDES Appeal No. 92-22, at 11 (EAB, June 20, 1994) (same holding under section 124.91(a)); *In re Suckla Farms, Inc. and City of Fort Lupton, Colorado*, UIC Appeal Nos. 92-7, 92-8, at 14-15 (EAB, June 7, 1993) (declining to allow a permit appeal under section 124.19 to be used as a vehicle for collaterally challenging the applicable regulations).

tion, and sound policy all support the opposite conclusion. We conclude, therefore, that the Region was not clearly erroneous in its determination that Tejon must sign the certification statement set forth at section 270.11(d). Accordingly, review of this issue is denied.

B. *Denial of the Permit Application*

The Region states that it denied the permit because the permit application did not bear a certification statement of the owner and was therefore incomplete. Section 270.10(c) provides that:

> The Director shall not issue a permit before receiving a complete application for a permit except for permits by rule, or emergency permits.

40 C.F.R. § 270.10(c). *See also* 40 C.F.R. § 124.3(d) ("If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provision including RCRA section 3008 * * *."). It is clear that the absence of a certification is a "deficiency" that renders an application incomplete. The rules provide that "[p]ermit applications * * * must comply with the signature *and certification requirements* of § * * * *270.11 (RCRA).*"). 40 C.F.R. § 124.3(a)(3) (emphasis added).

National argues, however, that even if Tejon is required to file a certification statement, denial of National's permit application is nevertheless inappropriate. This is because, in National's view, Tejon was not required to sign and certify National's application in the first place. National believes that Tejon could have filed its own application. National reasons, therefore, that because its application was not required to have a certification statement from Tejon, the absence of such a statement cannot render the application incomplete. In short, National asserts that the Agency has authority to issue a permit to National even if Tejon has not signed or certified any permit application. For the reasons set forth below, however, we conclude that Tejon and National are required to file a joint application and that National's application, therefore, is incomplete without Tejon's certification.

National's argument is contradicted by the plain language of the RCRA regulations. Section 270.10(b) does not provide that the owner *may* sign the operator's application if it chooses; it provides that "the owner *must* also sign the permit application." 40 C.F.R. § 270.10(b) (emphasis added). Thus, it does not merely allow owners and operators to file a joint application; it requires them to do so. Other provi-

sions in section 270.10 also appear to contemplate that the owner and operator will file a joint application. *See* 40 C.F.R. § 270.10(e)(1) ("Owners and operators of existing hazardous waste management facilities * * * must submit part A of their permit application no later than [the times specified.]"); 40 C.F.R. § 270.10(e)(4) ("At any time after promulgation of Phase II the owner and operator of an existing HWM facility may be required to submit part B of their permit application.").

This conclusion is confirmed by the regulatory history of section 270.10(b). That history is replete with statements to the effect that owners are required (not just allowed) to sign the permit application submitted by operators.[18] In fact, in the 1982 notice proposing an alternative certification statement for absentee owners, discussed above, the Agency also proposed an amendment to section 122.4(b) (which became section 270.10(b) after deconsolidation) to give the Regional Administrator discretion to accept a RCRA permit application without the signature of the owner. 47 Fed. Reg. 32038, 32040 (July 23, 1982). Such a rule change would have been unnecessary if owners were not required to sign applications submitted by operators. This conclusion is confirmed in the preamble to those proposed regulations, in which the Agency stated: "The regulations further require that to obtain a RCRA permit, the owner of a hazardous waste management facility, as well as the operator, must sign the application form (40 C.F.R. 122.4(b))." *Id.* at 32038. As noted above, Section 122.4(b) became section 270.10(b) after deconsolidation. Thus, the regulatory history of section 270.10(b) supports the conclusion that owners are not merely allowed to file joint applications with operators, but are required to do so.

The requirement that owners and operators file joint permits is also supported by sound policy reasons. First, the requirement ensures that the Agency will only have to respond to one permit application. This not only eliminates duplication but also, more importantly, avoids the possibility of conflicting permit applications. The joint application requirement also ensures that a permit not be issued unless the owner has also met its RCRA responsibilities. This emphasis on the important role of the owner is grounded in the language of RCRA itself. For example, section 3005 of RCRA requires the Administrator to promulgate regulations requiring *landowners* as well as operators to obtain

[18] *See, e.g.*, 45 Fed. Reg. 33295 (May 19, 1980) (Consolidated Permit Regulations) ("EPA is requiring both the owner and the operator to sign the permit application."); *id.* at 33299 ("However, for RCRA facilities, both the owner and the operator must sign the application;"); 47 Fed. Reg. 32038, 32039 (July 23, 1982) (unadopted proposal to allow submission of application without owner's signature in certain cases) ("There are several purposes behind the requirement that an owner co-sign a RCRA permit application.").

permits.[19] In requiring owners as well as operators to obtain permits, Congress obviously made a policy judgment that in situations where the owner of the facility was different from the operator, the operator could not always be counted on to ensure compliance with the permit and RCRA regulations.[20] Given the large potential costs of ensuring compliance with RCRA, as well as the financial consequences of non-compliance, Congress wanted owners to be involved in fulfilling that responsibility. The Agency's requirement that owners and operators file joint permit applications faithfully implements this Congressional objective by ensuring that no permit is issued to an operator unless the owner is meaningfully involved as well.

While the language of section 270.10(b) requires the owner and the operator to file a joint permit application, this does not mean that the "application" cannot consist of two separate documents containing the same information, one signed and certified by the owner and one signed and certified by the operator. We are not prepared to say that in such circumstances, the Region would be precluded from issuing a permit. In recognition of this possibility, two previous Agency decisions have suggested in dicta that section 270.10(b) does not preclude owners from filing separate permit applications. *See In re Waste Technologies Industries, East Liverpool, Ohio*, RCRA Appeal Nos. 92-7, *et alia*, at 12, n.15 (EAB, July 24, 1992) ("If the Port Authority does not sign the application, *Hawaiian Western Steel, supra*, at 9, makes it clear that the Port Authority must file its own separate application."); *In re Hawaiian Western Steel, Limited, Inc. and James Campbell Estate*, RCRA (3008) Appeal No. 88-2, at 8 (Adm'r, Nov. 17, 1988) (Order Denying Petition for Reconsideration on Interlocutory Appeal) ("Section 270.10(b) serves to streamline the permit process by relieving the owner of the responsibility for obtaining a separate permit when, and

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[19] *See* Section 3005(a) of RCRA, 42 U.S.C. § 6925(a):

> [T]he Administrator shall promulgate regulations requiring *each person owning or operating* an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste * * * to have a permit issued pursuant to this section.

(Emphasis added.)

[20] In other permitting contexts, Congress did not require owners to obtain permits in split owner/operator situations, and the Agency, consequently, did not require owners and operators to file joint permit applications in those contexts. In the UIC context, for example, the Agency's regulations provide that "[w]hen a facility * * * is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." 40 C.F.R. § 144.31(b). *See also In re Suckla Farms, Inc. and City of Fort Lupton, Colorado*, UIC Appeal Nos. 92-7, 92-8, at 11 (EAB, June 7, 1993) (in upholding a UIC permit, issued over the landowner's objections, the Board noted that questions of ownership are of limited significance in a UIC appeal since a landowner has no specific permit obligations under the federal UIC permitting scheme).

only when, the owner signs the operator's permit application."). National seizes on these decisions as support for its position, but its reliance on these cases is unjustified. While those decisions suggest that an owner may file a separate permit application, they cannot be read to suggest that the Agency may process the operator's application and issue a permit to the operator even if the owner has not properly signed and certified *any* permit application.[21] Section 270.10(b) certainly cannot be read to sanction such a result where, as here, the landowner has refused to certify any permit application in accordance with section 270.11(d). Thus, we reject National's reliance on these decisions.[22]

For all the foregoing reasons, we conclude that the Region was not clearly erroneous in its determination that the permit application should be denied as incomplete for lack of Tejon's certification. Accordingly review of this issue is denied.[23]

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[21] In *In re Waste Technologies Industries, East Liverpool, Ohio*, RCRA Appeal Nos. 92-7, *et alia* (EAB, July 24, 1992), we declined to review and invalidate a modified permit that, when originally issued nearly 10 years earlier, had been issued without requiring the landowner to join in the application. It is important to note that this case in no way condoned the granting of an initial permit for a RCRA facility unless both the owner and the operator had each complied with the signature and certification requirements. It merely acknowledged that at the time the permit was issued some permit-issuers mistakenly failed to enforce these requirements. We held that we lacked jurisdiction to review an error that had been made at the time of the original permit issuance.

[22] National argues that the appropriate remedy in this case is not denial of National's application, but an enforcement action against Tejon for failing to file its own application. This position, however, is based on the assumption that the Region could have issued a permit to National even though Tejon had not signed *and certified* a permit application. In the text above, however, we reject that assumption and hold that the Region was not authorized to process National's permit application and issue a permit to National, without having Tejon on the permit as well. Thus, confronted with the fact that Tejon — an owner of National's facility — had not signed and certified a permit application (either National's or one containing the same information), the Region had no choice but to deny the permit. As for an enforcement action against Tejon, refusing to sign and certify a permit application does not in itself violate any rules. However, if National were to operate the facility without a permit an enforcement action could be brought against Tejon as well as National. We recognize that Tejon's refusal to sign and certify a permit application makes it impossible for National to submit a complete permit application, but as we have pointed out elsewhere, that is an issue between National and Tejon to be worked out contractually by those two parties. It is not EPA's concern.

[23] National also argues that the Region is estopped from denying the permit, because in the past it accepted permit applications that did not bear the signature of the absentee landowner. We disagree. The fact that the Region at one time may have mistakenly accepted permit applications that were not signed by absentee landowners does not forever doom the Region to repeat the same mistake. Moreover, National and Tejon cannot be heard to complain that they relied on the Region's past practice, because they knew that the Region was insisting on full compliance with the regulations.

C. *National's Additional Arguments*

National makes a number of additional arguments why it believes the permit should not be denied for lack of Tejon's certification. Each of these will be addressed in turn.

First, National argues that, even if a literal reading of the rules requires Tejon to sign the certification statement, the Agency has the authority to, and should, relax the rules to allow Tejon either to sign a modified certification designed for absentee landowners or to not sign a certification statement at all. It is axiomatic that an agency must comply with its own regulations. *Service v. Dulles*, 354 U.S. 363, 372 (1957). However, as National points out, any agency has authority to relax procedural rules when justice so requires. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). In *American Farm Lines*, the Court upheld the Interstate Commerce Commission's decision to relax its procedural rules, because the rules at issue "were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion * * *; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so." *Id.* at 538-539. The Court regarded the rules at issue "not as inflexible procedural conditions but as tools to aid the Commission in exercising its discretion * * *." *Id.* at 539. For several reasons, however, we believe that it would be inappropriate for the Agency to relax the certification requirement in this case.

First, we seriously question (without deciding) whether the certification requirement is the kind of "procedural" rule that the *American Farm Lines* decision was addressing. In our view, the certification requirement serves a substantive role in assuring the integrity of the application process, thus benefitting the public as well as the Agency. The requirement also benefits absentee landowners by assuring that no permit is issued without their involvement and assent. Second, even if the certification requirement were to be considered a procedural rule, we are not convinced that justice requires its relaxation in this case. As discussed above, we think the problems National and Tejon now face are of their own making. Finally, we note that *American Farm Lines* merely recognizes that an Agency may *in its discretion* relax procedural rules when justice so requires. We do not believe that the Agency has abused that discretion in this case. Accordingly, review of this issue is denied.

National also makes a number of "policy" arguments against denial, which all boil down to the following argument: National is recy-

cling and eliminating hazardous waste in an environmentally safe manner. Such activity is environmentally beneficial and promotes the goals that RCRA was enacted to promote. The benefits of allowing National to continue recycling and eliminating hazardous waste far outweigh whatever policy goals are to be served by rigid adherence to the certification requirement. Yet the Agency has now terminated this beneficial activity by requiring adherence to this "procedural technicality," even though the absence of a certification statement does not involve a threat to human health or the environment. The Agency has articulated no rationale for this absurd result, preferring instead to hide behind its "fortress of regulations." For the reasons set forth below, we reject this argument.

Even though the burning of hazardous waste may be beneficial under proper circumstances, it must be carefully regulated. The BIF rule recognizes that the improper burning of high BTU hazardous waste could result in a harmful release of hazardous waste constituents and therefore requires a trial burn to demonstrate compliance with emission standards. 40 C.F.R. § 270.66. When the Agency proposed amendments to the definition of solid waste, it found that burning hazardous wastes for energy recovery is similar to incinerating them and "could pose a parallel or greater risk of environmental dispersal of hazardous waste constituents and products of incomplete combustion." 48 Fed. Reg. 14481-14482 (April 4, 1983). Moreover, when Congress amended RCRA in 1984, it imposed a deadline on EPA "to develop and implement a comprehensive regulatory program over burning and blending for energy recovery." H. Rep. No. 198, 98th Cong., 1st Sess., 39 (1983); *see* section 3004(q)(1) of RCRA, 42 U.S.C. § 6924(q)(1). Specifically, Congress mandated EPA to close what the House Committee on Energy and Commerce characterized as a "loophole" by requiring the Agency to promulgate rules that regulate burners of hazardous waste for energy recovery, including cement kilns. H. Rep. No. 198, 98th Cong., 1st Sess., 39 (1983). In considering the 1984 Amendments, the same House Committee rejected the suggestion that cement kilns should be exempt from RCRA regulation, observing:

> EPA has recently proposed that cement kilns and "industrial furnaces" that burn hazardous waste for fuel would continue to be exempt from regulation. The Committee does not consider such exemption, particularly for cement kilns, to be consistent with its intent in closing the burning and blending exemption if it were to be extended beyond the two year date for promulgating regulations contained in this Section. This continued exemption could well be inconsistent with the

> RCRA mandate to regulate hazardous wastes as necessary to protect human health and the environment. The Committee does not consider cement kilns burning hazardous waste for energy (not recycling cement kiln dust for clinker) to be distinguishable from a commercial hazardous waste incinerator in its potential impact on human health and the environment.

Id. at 40. In fact, after Congress amended RCRA in 1984 (and until EPA promulgated the BIF rule), Congress banned the burning of hazardous waste as fuel in cement kilns at those facilities located in heavily populated areas, unless the cement kilns met already promulgated incinerator standards. *See* section 3004(q)(2)(C)(i) of RCRA, 42 U.S.C. § 6924(q)(2)(C)(i). Thus, despite any environmental benefits of recycling hazardous wastes, the fact remains that National is dealing with hazardous wastes and Congress has mandated that they be regulated as such.[24] This is the essential "policy" choice. As such, it is important to assure that any facility burning such wastes comply with the permitting scheme established to ensure proper handling and burning of such wastes.

As previously discussed, the certification requirement is an integral part of that permitting scheme. The certification requirement requires the absentee owner to become sufficiently aware of the nature of the facility operations so that it can play a meaningful role in ensuring compliance with the permit and the RCRA regulations. Adherence to the certification requirement is particularly appropriate in a case like this one, where an absentee owner refuses to sign the certification statement. This refusal suggests a reluctance to gain any understanding of the operations of the facility, even the relatively superficial understanding required by the certification statement. Such reluctance at the permitting stage does not bode well for the future. It suggests that once the facility is operational the absentee landowner will not be willing to play a meaningful role in ensuring compliance with the permit or regulations. Given this attitude on the part of the landowner, a policy supporting denial of the permit application is eminently reasonable. Hence, terminating National's operations by requiring adherence to the certification rule does not strike us as absurd or irrational.

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[24] *See* H. Rep. No. 198, 98th Cong., 1st Sess., at 42 (1983) ("In promulgating regulations, the Agency must regulate all combustion units burning hazardous waste-deriving fuel for energy recovery — including boilers, cement kilns, and other industrial furnaces — under the same ultimate standards as other hazardous waste management facilities regulation as may be necessary to protect human health and the environment.").

We conclude, therefore, that the "policy" considerations raised by National do not warrant review. Accordingly, review of these policy arguments is denied.

An additional legal argument made by National is that section 3004(a) of RCRA, 42 U.S.C. § 6924(a), prohibits the Region from terminating the operation of National's facility for the mere reason that Tejon has not certified the application. Among other things, that section directs EPA to promulgate ownership qualifications for hazardous waste facilities. Section 3004(a)(6) of RCRA, 42 U.S.C. § 6924(6). That section also provides that such qualifications shall not prevent a private entity from operating a facility, if such entity can "provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of the risks associated with" the facility. Section 3004(a) of RCRA, 42 U.S.C. § 6924(a). National argues that the Region's interpretation of section 270.11(d) effectively prohibits lessees from operating facilities, thus requiring that an entity may not operate a facility unless it also owns the facility. We disagree. The certification requirement is not a qualification on ownership, and section 3004(a) therefore does not apply. Review on this basis is denied.

Finally, National raises arguments under three clauses of the U.S. Constitution: the due process clause, the takings clause, and the contract clause. All three arguments are based on the assumption that the Region's position effectively makes it impossible for a lessee to obtain a RCRA permit. We disagree with this assumption. As we have noted, National's permitting problem in this case could have been remedied if it had obtained a suitable contractual arrangement with Tejon. The Region waited over a year to allow these parties to resolve their differences in a manner that would allow National to complete its application. When it became clear they could not, the Region was left with no choice but to find the application incomplete and deny it. We have no reason to think that this will be the inevitable, or even typical, situation, if both parties are interested in the leasing agreement. Because we disagree with the National's assumption that a lessee will be unable to obtain a RCRA permit, we need not reach National's constitutional claims.

III. *CONCLUSION*

For all the foregoing reasons, we reach the following conclusions: (1) the Region was not clearly erroneous in its determination that any individual signing a permit application on behalf of Tejon must also sign a certification statement under 40 C.F.R. § 270.11(d); (2) the Region was not clearly erroneous in determining that the absence of

Tejon's certification statement in National's permit application rendered that application incomplete and in denying the permit application on that basis; (3) none of the additional arguments made by National warrant review. Because National has not demonstrated that the Region's decision is based on clearly erroneous factual or legal conclusions or involves important policy considerations, we are denying review of its petition. For the same reasons, we are also denying review of Systech's petition.[25]

So ordered.[26]

[25] In its Petition for Review, National requested an opportunity for oral argument. Because the Board believes that oral argument would not materially assist it in considering the issues raised on appeal, National's request is denied.

[26] 40 C.F.R. § 124.19(f)(i) requires that a final permit decision be issued by the Regional Administrator "[w]hen the Environmental Appeals Board issues notice to the parties that review has been denied [.]" National has requested that, if the Board issues a decision adverse to National's position, the effective date of any final permit denial be 30 days after the Board's decision. National also requests that if it seeks judicial review, the effective date be further stayed pending such review. The Board notes that the Region gave National repeated extensions of time to resolve its problem with Tejon before issuing the permit denial. We agree with the Region that continued operation without full compliance with the RCRA regulations is unacceptable and should not be tolerated. For these reasons, National's request to the Board for a delayed effective date and stay pending judicial appeal must be denied.