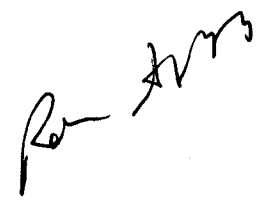


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6/17/04

June 16, 2004



Henry W. Baney
Chief, Fiber and Organics Branch
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
Room 4355JJ
1301 Constitution Avenue
Washington, D.C. 20004

Re: Status of EPA Response to Court Remand of Storage for Reuse
Regulation – 40 C.F.R. § 761.35

Dear Mr. Baney:

I write on behalf of the Utility Solid Waste Activities Group (“USWAG”) to inquire about the status of EPA’s response to the nearly four-year old remand Order from the United States Court of Appeals for the Fifth Circuit regarding the Agency’s “storage for reuse” rule for PCB Articles (40 C.F.R. § 761.35). As you know, the Court in *Central & South West Services, Inc. v. EPA*, 220 F.3d 683 (5th Cir. 2000) found that EPA did not comply with the Administrative Procedure Act (“APA”) by failing to provide an explanation for why the Agency declined to grant a nationwide exemption from the storage for reuse rule for the electric utility industry. *Id.* at 692. As the Court explained, “EPA’s specific request for comments on the appropriateness of a national variance and the numerous comments that EPA received on this request required EPA to give reasons for declining to promulgate a national variance.” *Id.* As a result, the Court remanded the regulation to the Agency to “provide a reasoned statement of why it did not grant a nationwide variance for the electric utility industry.” *Id.*

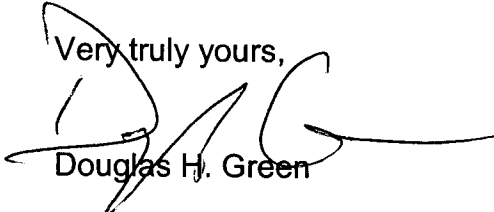
It is now approaching four years since the Fifth Circuit directed EPA to provide a reasoned explanation for its decision not to grant this exemption to the electric utility industry. To date, EPA has not responded to the Court’s Order and, to our knowledge, there is no definitive time frame by which EPA plans to respond to the Order. The APA imposes on EPA an obligation to “proceed to conclude a matter presented to it” and to do so “within a reasonable time.” See 5 U.S.C. § 555(b). USWAG respectfully submits that a four-year delay in responding to the Court’s remand Order in this case is inconsistent with EPA’s obligation under the APA to respond to this matter in a “reasonable time.” See *Mukwema Tribe v. Babbitt*, 133 F. Supp. 2d 30, 37 (D.D.C. 2000) (finding that “the ambiguous, indefinite time frame for review” of a petition

pending before an agency constituted “unreasonable delay within the meaning of APA § 706(1)”). Indeed, courts have found similar delays unreasonable in instances in which agencies were required to perform far more onerous and complex tasks than explaining a decision. See *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (finding four-year delay in development of telephone rates unreasonable). The fact that EPA does not appear to have a definitive timeframe for taking such action compounds the gravity of this delay. *Mukwema Tribe*, 133 F. Supp. 2d at 37 (agency’s lack of timetable for taking action “defeats any assertion that the process proceeds with reasonable dispatch”).

During the pendency of this remand, USWAG members have invested substantial resources in complying with a rule that the Fifth Circuit found was promulgated in contradiction of the APA. While the Court chose to remand, as opposed to vacate, the regulation, it did so on the express condition that EPA provide a reasoned explanation as to why it did not grant an exemption for electric utilities. Until EPA provides a reasoned explanation for its action, the regulation remains defective and USWAG members are being required to comply with a regulation that, to date, EPA has not adequately justified imposing on electric utilities. See *Checkosky v. S.E.C.*, 23 F.3d 452, 490-493 (D.C. Cir. 1994) (Opinion of Randolph, J.) (questioning the validity of simply remanding, as opposed to vacating, a regulation that, like 40 C.F.R. § 761.35, was promulgated in violation of law).¹

In light of the above, USWAG respectfully requests that EPA provide a reasoned response to the Court’s Order with the greatest possible speed. We also would appreciate EPA advising USWAG of the Agency’s schedule for responding to the Order.

Thank you in advance for your attention to this matter.

Very truly yours,

Douglas H. Green

cc: Ann Klee, EPA
Acting General Counsel

¹ Since the Court’s remand Order, USWAG members have been compelled to seek extensions for their storage for reuse activities under 40 C.F.R. § 761.35(b) and to continue to comply with the rule’s new storage requirements. We understand that all of the extension requests filed by USWAG members for the continued storage for reuse of PCB Articles were approved by the various EPA Regions, supporting EPA’s initial supposition in the proposed rule (and USWAG’s contention in its comments) that a nationwide exemption from § 761.35 for electric utilities *would be* appropriate.