UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 31 2010

OFFICE OF
AIR AND RADIATION

Kenneth N. Wycherley
General Manager
Exeter Energy Limited Partnership
10 Exeter Drive
P.O. Box 188
Sterling, CT 06377

Re: CAIR Applicability Determination for the Exeter Energy Facility (Facility ID (ORISPL) 50736) located in Sterling, Connecticut

Dear Mr. Wycherley:

This letter is EPA's determination of applicability of the CAIR NO_x Ozone Season Trading Program for the Exeter Energy Facility (Exeter) located in Sterling, Connecticut. This determination is made in response to Exeter Energy Limited Partnership's (Exeter Energy) September 1, 2006 submission in response to the August 4, 2006 Notice of Data Availability (NODA) (71 Fed. Reg. 44283 (Aug. 4, 2006)) for EGU NO_x Allocations for the CAIR Federal Implementation Plan (FIP). In the September 1, 2006 submission, Exeter Energy objected to inclusion of the Exeter units in the allocation tables in the NODA and submitted information regarding operation of its two incinerators/reciprocating grate boilers and support for its position. In the November 1, 2007 NODA Response Document, EPA stated that it would issue a determination of applicability in response.[1] Exeter Energy provided supplemental information on August 27, 2007, September 25 and December 4, 2009, and January 15 and 26, April 22, and May 10, 2010. Exeter Energy claimed that each of the units qualify as a "solid waste incineration unit" exempt from the requirements of the CAIR FIP.

Background

Construction of Exeter commenced in November 1989, and the facility commenced commercial operation on June 23, 1991. See Exeter Energy's September 25, 2009 submission (response to Question 2). The facility includes two boilers that supply

[1] Connecticut is no longer subject to the CAIR FIP and instead has, in its State Implementation Plan (SIP), an approved CAIR NO_X Ozone Season Trading Program. However, EPA is addressing here the objections raised by Exeter Energy in connection with the August 4, 2006 NODA. To the extent the applicability provisions for Connecticut's CAIR SIP program include the same applicability criteria as the CAIR FIP program, EPA's determination here is applicable under Connecticut's CAIR SIP program.

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steam to a 31.3 MWe steam turbine generator, which in turn provides electricity to the grid. According to Exeter Energy, the boilers are fueled by whole and shredded tires from commercial or industrial establishments. Data submitted by Exeter Energy show that, for the 2 boilers together, annual heat input (in Btus) from combustion of tires comprised an annual average of 99.2% of total annual energy input during 1992-2009 and never fell below 98.5% and that fuel input to each boiler was virtually the same. The remaining heat input was from propane during start-ups. The boilers are also permitted to burn No.2 distillate oil for start-ups but have used propane exclusively for this purpose. See Exeter Energy's December 4, 2009 submission (attached spreadsheet) and May 10, 2010 submission (response to Question 1).

Exeter originally was certified as a qualifying small power production facility and commenced commercial operation, as a qualifying facility, under a power purchase agreement (dated December 1, 1989 and amended on August 1 and 19, 1993; referred to herein as the "December 1, 1989 agreement") with Connecticut Light and Power Company. See Exeter Energy's September 25, 2009 submission (response to Question 4); see also Exeter Energy Limited Partnership, 36 FERC ¶62,208 (Aug. 20, 1986) (approving certification as qualifying small power production facility); and Exeter Energy Limited Partnership, 48 FERC ¶62,135 (Aug. 17, 1989) and Modesto Energy Limited Partnership, 55 FERC ¶61,355 (Je. 3, 1991) (approving recertification as qualifying small power production facility because, inter alia, equity interest of CMS Energy Corporation, an electric utility holding company, in Exeter Energy Limited Partnership, which owned Exeter, did not exceed 50%). The December 1, 1989 agreement (in Section 14(b)) provided that it would continue in place, but with a reduced power purchase price, if and when Exeter no longer met the requirements for being a qualifying facility. Exeter operated under that agreement -- as a qualifying facility for all but about two days -- until the agreement was terminated on March 31, 2001, pursuant to the Termination and Release Agreement, dated July 15, 1999.

On March 30, 2001, CMS Energy Corporation, an electric utility holding company, increased its equity interest in Exeter to 100%, with the result that the facility then no longer met the requirement -- necessary for being a qualifying facility -- that the public-utility-held portion of equity interest in the facility not exceed 50%. See Exeter Energy's September 25, 2009 submission (response to Question 4) and May 10, 2010 submission (response to Question 2); and 66 Fed. Reg. 18761, 18763 (Apr. 11, 2001) (stating that, in a April 2, 2001 filing, Exeter asserted that it is wholly-owned subsidiary of CMS Generation Co., which is in turn a wholly-owned indirect subsidiary of CMS Energy Corporation). Exeter continued to produce and sell electricity, although no longer as a qualifying facility. Instead, Exeter sold its electricity under short term sales agreements in the competitive electricity market through May 31, 2002, under two power purchase agreements during June 1, 2002-December 31, 2004 and January 1, 2005–December 31, 2006 respectively, and again under short term sales agreements thereafter. Exeter Energy's April 22, 2010 submission (response to Questions 2 and 3) and May 10, 2010 submission (response to Question 3). EPA summarizes Exeter's status and operations since commencement of commercial operation as follows: Exeter has always burned only tires (plus propane for start-up); Exeter was, and produced and sold

electricity as, a qualifying facility from commencement of commercial operation until March 30, 2001; and thereafter Exeter has continued to produce and sell electricity, but not as a qualifying facility.

Discussion

The CAIR NO_x Ozone Season Trading Program applies to CAIR NO_x Ozone Season units, which are, in general, "stationary, fossil-fuel-fired boilers or stationary, fossil-fuel-fired combustion turbines serving at any time, since the later of November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MWe producing electricity for sale." 40 CFR 97.304(a)(1). Further, the CAIR trading program defines the term "fossil fuel" as "natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material." 40 CFR 97.302. The boilers at Exeter meet the general applicability criteria because each boiler burns fossil fuel (e.g., propane) and serves a generator with a nameplate capacity of 31 MWe producing electricity for sale.

However, the applicability provisions exempt certain units meeting the general applicability criteria from being CAIR NO_x Ozone Season units and subject to the CAIR trading program. 40 CFR 97.304(b). In particular, any unit that meets the general applicability criteria and commenced operation on or after 1985:

> (A) Qualifying as a solid waste incineration unit; and
> (B) With an average annual fuel consumption of non-fossil fuel for the first 3 calendar years of operation exceeding 80 percent (on a Btu basis) and an average annual fuel consumption of non-fossil fuel for any 3 consecutive calendar years after 1990 exceeding 80 percent (on a Btu basis)

is not a CAIR NO_x Ozone Season unit. 40 CFR 97.304(b)(2)(ii). (This is referred to as the solid waste incineration unit exemption.)[2]

Under the CAIR trading program, a solid waste incineration unit is "a stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine that is a 'solid waste incineration unit' as defined in section 129(g)(1) of the Clean Air Act" (CAA). 40 CFR 97.302 (definition of "solid waste incineration unit"). CAA Section 129(g) in turn defines a solid waste incineration unit as

> <u>a distinct operating unit of any facility which combusts any solid waste material</u> from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels). Such term does not include

[2] The CAIR trading program rules also establish an exemption for cogeneration units meeting certain criteria. 40 CFR 97.304(b)(1). Because each boiler at Exeter produces only electricity and no useful thermal energy and so is not a cogeneration unit, this second exemption is not applicable.

> incinerators or other units required to have a permit under section 3005 of the Solid Waste Disposal Act. The term 'solid waste incineration unit' does not include (A) materials recovery facilities (including primary or secondary smelters) which combust waste for the primary purpose of recovering metals, (B) qualifying small power production facilities, as defined in section 3(17)(C) of the Federal Power Act (16 U.S.C. 769(17)(C)), or qualifying cogeneration facilities, as defined in section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)), which burn homogeneous waste (such as units which burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or in the case of qualifying cogeneration facilities which burn homogeneous waste for the production of electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes, or (C) air curtain incinerators provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations to be established by the Administrator by rule.

42 U.S.C. 7429(g) (1) (emphasis added). Under section 129(g)(6) of the CAA, the term "solid waste" has the same meaning as set forth in the Solid Waste Disposal Act (SWDA). The SWDA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."[3] 42 U.S.C. 6903(27).

The CAIR trading programs for NO_X annual, NO_X ozone season, and SO_2 include the same applicability provisions and "fossil fuel" definition. See 40 CFR 97.102 and 97.202 (definition of "fossil fuel") and 97.104(a)(1) and (b)(2)(ii) and 97.204(a)(1) and (b)(2)(ii). In adopting the solid waste incineration unit exemption under the CAIR trading programs, EPA expressly fashioned it to be "analogous" to the exemption for solid waste incineration units from being units (i.e., "utility units") subject to the Title IV Acid Rain Program. 70 Fed. Reg. 49708, 49729 (Aug. 24, 2005); see also 71 Fed. Reg. 25328, 25348 (Apr. 28, 2006). The exemption from the Acid Rain Program was established by Congress in CAA section 129(h)(4), which provides:

> A solid waste incineration unit shall not be a utility unit as defined in title IV: *Provided,* That, [sic] more than 80 per centum of its annual average fuel consumption measured on a Btu basis, during a period or periods to be determined by the Administrator, is from a fuel (including any waste burned as a fuel) other than a fossil fuel. 42 U.S.C. 7429(h)(4).

EPA implemented CAA section 129(h)(4) in §72.6(b)(7), which includes, in a list of categories of units that "are not affected units subject to the requirements of the Acid Rain Program," the following category for solid waste incineration units:

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[2] In provisions not relevant here, the solid waste definition in the SWDA also explicitly excludes certain identified materials.

> A solid waste incineration unit, if more than 80 percent (on a Btu basis) of the annual fuel consumed at such incinerator is other than fossil fuels. For solid waste incinerators which began operation before January 1, 1985, the average annual fuel consumption of non-fossil fuels for calendar years 1985 through 1987 must be greater than 80 percent for such an incinerator to be exempt. For solid waste incinerators which began operation after January 1, 1985, the average annual fuel consumption of non-fossil fuels for the first three years of operation must be greater than 80 percent for such an incinerator to be exempt. If, during any three calendar year period after November 15, 1990, such incinerator consumes 20 percent or more (on a Btu basis) fossil fuel, such incinerator will be an affected source under the Acid Rain Program. 40 CFR 72.6(b)(7).

EPA defined "fossil fuel," for purposes of the Acid Rain Program, as "natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material." 40 CFR 72.2 (definition of "fossil fuel"). In short, the language for the exemption for solid waste incineration units from the Acid Rain Program and the language in the solid waste incineration unit exemption under the CAIR trading program are virtually the same.

Exeter Energy asserted that the Exeter boilers are solid waste incineration units as defined under CAA section 129(g)(1) and that the exclusions in clauses (A), (B) or (C) of that definition do not apply to these units. Exeter Energy contended that, under the definition, a boiler that burns homogeneous solid waste but is not currently a qualifying small power production or cogeneration facility and that is not covered by any of the other exclusions, is a solid waste incineration unit. Further, according to Exeter Energy, because tires are not a fossil fuel and each boiler's non-fossil fuel has consumption consistently exceeded 80% of total fuel consumption on a Btu basis, the boilers are not CAIR NO_x Ozone Season units.

<u>EPA's Determination</u>

As discussed above, the boilers at Exeter meet the general criteria for being CAIR NO_x Ozone Season units because each boiler is a fossil-fuel-fired boiler serving a generator with a nameplate capacity exceeding 25 MWe producing electricity for sale. Unless the boilers qualify for the solid waste incineration unit exemption, the boilers will be subject to the CAIR trading program.

The initial requirement for this exemption for each boiler obviously is that the boiler must be a solid waste incineration unit, as defined in section 129(g)(1) of the CAA. According to Exeter Energy, material (i.e., tires) that each boiler combusts is obtained from commercial or industrial establishments. If such material is solid waste and each boiler meets the remaining requirements for qualifying as a solid waste incineration unit under CAA section 129(g), then each boiler will qualify as a solid waste incineration unit. However, because EPA is considering in other contexts what constitutes "solid waste" and thus what facilities are "solid waste incineration units", EPA cannot at this time make

a determination about whether the Exeter boilers combust solid waste and are solid waste incineration units.

Specifically, section 129 of the CAA requires, among other things, that EPA establish emissions standards for "solid waste incineration units", as defined in CAA section 129(g)(1), which, under CAA section 129(g)(6), incorporates the definition of "solid waste" in the SWDA. The same term, "solid waste incineration unit" is used in CAA section 129(h)(4) to establish the solid waste incineration unit exemption under the Acid Rain Program, which, as discussed above, is virtually the same as the solid waste incineration unit exemption under the CAIR trading programs. In 2007, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded two sets of EPA rules, one issued under CAA section 129 and defining the term "commercial or industrial solid waste incineration unit" and the other issued under CAA section 112 and setting emissions standards for industrial boilers and furnaces. NRDC v. EPA, 489 F.3d 1250 (D.C. Cir. 2007). In those rules, EPA had excluded from the category of commercial or industrial solid waste incineration units those units that can or do recover useful thermal energy from the combustion of solid waste. Id. at 1257. The Court held that any unit burning any "solid waste" at all must be treated as a solid waste incineration unit for purposes of CAA section 129. Id. at 1257-61.

In response to the vacatur and remand, EPA issued an advanced notice of proposed rulemaking discussing in detail, and requesting comment on, possible approaches to identifying which non-hazardous secondary materials combusted in combustion units are "solid waste". Identification of Non-Hazardous Materials That Are Solid Waste, 74 Fed. Reg. 41 (January 2, 2009). EPA subsequently received extensive comments from about 80 parties (including industry, environmental groups, and state and local governments) on the advanced notice. Recently after evaluating these comments, EPA issued a proposed rule addressing the definition of "solid waste" and has requested comments on that proposal. Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 75 Fed. Reg. 31844 (Je. 4, 2010). EPA will evaluate these comments before issuing a final rule. Because EPA has proposed, but not adopted as final, a definition of "solid waste" in that ongoing rulemaking proceeding, EPA concludes that any discussion of, or determination concerning, the "solid waste" definition in this much more limited action involving an applicability determination for a single facility (i.e., Exeter) would be premature. Addressing "the solid waste" definition first in the ongoing rulemaking will allow EPA to consider the definition in a much broader context where the full ramifications of alternative approaches to the definition can be considered and where EPA will have the benefit of comments and technical and other information from a wide range of interested parties.

Although EPA cannot at this time make a final determination as to whether Exeter is combusting solid waste, EPA finds that, for purposes of the CAIR trading program, the Exeter boilers meet the remaining criteria for qualifying as solid waste incineration units, i.e., that the boilers must be distinct operating units, not be required to have a permit under SWDA section 3005, and not be covered by the exclusions in clauses (A), (B) or (C) of the solid waste incineration unit definition in CAA section 129(g)(1). In summary,

for the reasons discussed below, EPA finds that the Exeter boilers will qualify as solid waste incineration units if the boilers combust material that is determined by the Administrator to be solid waste as defined pursuant to EPA's ongoing rulemaking proceeding to identify which non-hazardous secondary materials are solid wastes when combusted in a unit.

To begin, EPA finds that each boiler at Exeter is a distinct operating unit and is not required to have a permit under SWDA section 3005 because it does not burn any hazardous material. Further, not being materials recovery facilities or air curtain incinerators, the boilers are not covered by the exclusions in clauses (A) (for materials recovery facilities) or (C) (for air curtain incinerators) in the definition of solid waste incineration unit in CAA section 129(g).

With regard to the exclusion in clause (B), as discussed above, Exeter was originally, but since March 31, 2001 has no longer been, a qualifying small power production facility. Specifically, as discussed above, Exeter has always burned only tires (plus propane for start-up), was certified and compensated for its electricity generation as a qualifying small power production facility starting June 23, 1991 and until March 30, 2001, and thereafter continued to sell electricity, but not as a qualifying facility. If the tires that the Exeter boilers combust are determined by the Administrator to be solid waste as defined pursuant to EPA's ongoing rulemaking proceeding to identify which non-hazardous secondary materials are solid wastes when combusted in a unit, then the boilers were -- until March 30, 2001 -- a qualifying facility combusting a "homogeneous waste" (i.e., tires) and thus were covered by the exclusion under clause (B).

As discussed above, the solid waste incineration unit exemption under the CAIR NO_X Ozone Season Trading Program under §97.304(b)(2)(ii) requires that, as a unit commencing operation after January 1, 1985, each Exeter boiler must be a unit "[q]ualifying as a solid waste incineration unit" and, for its first 3 calendar years of operation (i.e., 1992-94) and every 3 consecutive calendar years thereafter, meeting the limitation on combustion of fossil fuel. 40 CFR 97.304(b)(2)(ii)(A). Section 97.304(b)(2)(ii) does not state <u>when</u> a unit must qualify as a solid waste incineration unit and, in particular, whether a unit must so qualify not only during, but also before, the period when the exemption would apply. For example, it is unclear whether a unit must so qualify starting when it begins generating electricity. <u>Compare</u> 40 CFR 97.304(b)(2)(ii)(A) <u>with</u> 40 CFR 97.304(b)(2)(i)(A) (stating that the exemption for cogeneration units covers a unit "[q]ualifying as a cogeneration unit during the 12-month period starting on the date the unit first produces electricity and continuing to qualify as a cogeneration unit"). Consequently, §97.304(b)(2)(ii) alone does not definitively answer the question of whether units that were a qualifying facility that perhaps burned homogeneous waste, and thus perhaps did not qualify as solid waste incineration units,[4]

[4] As noted above, the question of whether the tires burned by the Exeter boilers are solid waste (and thus homogenous waste) will be addressed in the above-mentioned, ongoing EPA rulemaking proceeding to identify which non-hazardous secondary materials are solid wastes.

but that subsequently lost their qualifying facility status and thus now qualify as solid waste incineration units, meet the requirement of "qualifying as a solid waste incineration unit." 40 CFR 97.304(b)(2)(ii)(A).

However, EPA believes that, in light of the ambiguity of §97.304(b)(2)(ii)(A) on this question, the answer can be found by considering §97.304(b)(2)(iii), which provides that:

> If a unit qualifies as a solid waste incineration unit and meets the requirements of ...paragraph (b)(2)(ii)...for at least 3 consecutive calendar years, but subsequently no longer meets all such requirements, the unit shall become a CAIR NO_X Ozone Season unit starting on the earlier of January 1 after the first calendar year during which the unit first no longer qualifies as a solid waste incineration unit or January 1 after the first 3 consecutive calendar years after 1990 for which the unit has an average annual fuel consumption of fossil fuel of 20 percent or more. 40 CFR 97.304(b)(2)(iii).

In this case, starting March 30, 2001 and continuing thereafter, the Exeter boilers were no longer a qualifying facility and therefore were not covered by any of the exclusions from the "solid waste incineration unit" definition in clauses (A), (B), and (C) in CAA section 129(g). If Exeter met for that period (which encompasses, thus far, 8 consecutive calendar years), and continues to meet, the other requirements for being a solid waste incineration unit and the limit on fossil fuel combustion, §97.304(b)(2)(iii) provides that the Exeter boilers will not become CAIR units until the earlier of January 1 after the first year when the boilers no longer are solid waste incineration units or January 1 after the first 3 years when they have (on an average annual basis) fossil fuel heat input comprising 20 percent or more of their total heat input. Because §97.304(b)(2)(ii) does not explicitly require qualification as a solid waste incineration unit before the period when the solid waste incineration units exemption would apply, EPA concludes that, under §97.304(b)(2)(iii), the Exeter boilers can still qualify for the solid waste incineration unit exemption under the CAIR trading program -- even though they previously were a qualifying facility burning tires and thus perhaps were not solid waste incineration units -- if they burned (and continue to burn) solid waste as defined in the above-mentioned EPA rulemaking proceeding (see n.4), were not (and continue not to be) a qualifying facility, and met (and continue to meet) the fossil fuel combustion limit.[5]

Finally, EPA finds that each Exeter boiler meets the fossil fuel combustion limit under the solid waste incineration unit exemption, i.e., the requirement of having average annual consumption of non-fossil fuel, for each rolling 3-year period since 1990,

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[5] EPA notes that, once a unit becomes a CAIR NO_X Ozone Season unit under §97.304(b)(2)(iii) (whether by no longer qualifying as a solid waste incineration unit or by failing to meet the fossil fuel use limitation), §97.304(b)(2)(iii) does not alter such a unit's status as a CAIR NO_X Ozone Season unit based on any subsequent changes in the unit's status as a solid waste incineration unit or the unit's fossil fuel use. Such a unit will remain a CAIR NO_X Ozone Season unit, regardless of any subsequent changes.

exceeding 80% of total fuel consumption on a Btu basis. As noted above, the CAIR trading program regulations define "fossil fuel" as "natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material." 40 CFR 97.302 (definition of "fossil fuel"). The portions of the Exeter boilers' heat input that could conceivably be fossil fuel under this definition are propane (which is derived from petroleum or natural gas) and tires (which contain materials derived from petroleum). As noted above, for each year since the commencement of operation of each Exeter boiler and through 2009, propane has accounted for less than 2% of each boiler's annual heat input. As explained below, EPA determines that, solely for purposes of applying the fossil-fuel-combustion requirement in the solid waste incineration unit exemption, tires are not a fossil fuel.

Exeter Energy claimed, in its September 1, 2006 submission (at 2), that, although tires are manufactured from petroleum-derived materials, they are "not specifically manufactured as a fuel, i.e., to provide useful heat." According to Exeter Energy, "waste tires used to produce tire-derived fuel should not be considered a fossil fuel." Id.

The definitions of "fossil fuel" in the Acid Rain and CAIR trading programs -- i.e., "natural gas, petroleum, or coal or any form of solid, liquid, or gaseous fuel derived from such material" (40 CFR 72.2, 40 CFR 97.102, 97.202, and 97.302 (definition of "fossil fuel")) -- contrast with the definition of "fossil fuel" in part 60 of EPA's regulations, which implement section 111 of the CAA. Section 60.41Da defines "fossil fuel" as "natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material for the purpose of creating useful heat" (40 CFR 60.41Da (definition of "fossil fuel") (emphasis added)). On its face, the "fossil fuel" definition in the Acid Rain and CAIR trading programs appears to include any material that is used in a boiler or combustion turbine as fuel (i.e., that is combusted in a boiler or combustion turbine) and is derived from natural gas, petroleum, or coal because the definition lacks the caveat that, in addition, the original purpose for which the material was produced must be for use as a fuel. EPA maintains that the difference in language between the two different "fossil fuel" definitions should not be ignored in the absence of compelling reasons for doing so. EPA can find no basis for treating the original-purpose qualification as implicit -- and thus for ignoring the lack of such an express qualification -- in all circumstances where the term "fossil fuel" is used in parts 72, 96, and 97. In short, the parts 72, 96, and 97 "fossil fuel" definition lacks the express original-purpose qualification included in, and so should generally be interpreted as broader than, the §60.41Da "fossil fuel" definition .

However, as recently explained in Wheelabrator Ridge Energy Facility at 8-14 (September 9, 2009), EPA maintains that, while the broader interpretation of the parts 96 and 97 "fossil fuel" definition is generally applicable under the CAIR trading programs,[6] a narrower interpretation of that definition should be applied solely in the context of implementing the fossil-fuel-combustion requirement in the solid waste incineration unit

[6] For example, the broader interpretation is used in the general applicability provisions of the CAIR trading program regulations. See, 40 CFR 97.104(a), 97.204(a), and 97.304(a).

exemption. As discussed above, both Congress -- in CAA section 129(h)(4) for the Acid Rain Program -- and EPA -- in the CAIR trading programs -- established an exemption for solid waste incineration units that produce electricity for sale and meet the other general applicability criteria for the respective trading programs. In Wheelabrator Ridge (at 8-12), EPA determined that, if the broader interpretation of the "fossil fuel" definition were used in implementing the fossil-fuel-combustion requirement in the exemption for solid waste incineration units that produce electricity for sale, it is likely that very few, if any, units would meet the exemption requirement that "fossil fuel" comprise less than 20% of total heat input. As a result, very few or no units producing electricity for sale would be able to qualify for the exemption, whether under the Acid Rain Program or the CAIR trading programs, and the broader interpretation would, in effect, virtually nullify the exemption. Since Congress clearly intended to create a solid waste incineration unit exemption from the Acid Rain Program and EPA expressly intended to continue an analogous exemption in the CAIR trading programs, use of the broader interpretation of "fossil fuel" would be inconsistent with EPA's intent in adopting the CAIR trading program regulations.

For this reason and the other reasons set forth in Wheelabrator Ridge (at 12-13), EPA believes that it is reasonable to adopt the narrower construction of the term "fossil fuel" solely for purposes of applying the fossil-fuel-combustion requirement in the solid waste incineration unit exemption because there are compelling reasons for treating, as implicit in the "fossil fuel" definition applied solely in that context, a limitation of "fossil fuel" to materials derived for the purpose of creating useful heat. As explained in Wheelabrator Ridge (at 13-14), EPA finds that, solely in the context of applying this requirement, tires are not a fossil fuel.[7] Consequently, each Exeter boiler meets during 1993-2009 the requirement that annual heat input from fossil fuel comprises, on a 3-year rolling average basis, less than 20%; the actual figure for each Exeter boiler is less than 2%. EPA therefore concludes that, if the boilers at the Exeter facility are determined to combust "solid waste" as defined pursuant to the ongoing EPA rulemaking proceeding to identify which non-hazardous secondary materials are solid wastes when combusted in a unit, the boilers will not be CAIR NO_x Ozone Season units.[8]

EPA's determination relies on the accuracy and completeness of the information provided by Exeter Energy Limited Partnership for the Exeter Energy facility in the September 1, 2006, August 27, 2007, September 25 and December 4, 2009, and January 15 and 26, April 22, and May 10, 2010 submissions and is appealable under 40 CFR Part

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[7] However, as noted above, the question of whether the tires are solid waste will be addressed in the above-mentioned, ongoing EPA rulemaking proceeding.

[8] EPA notes that assertions by Exeter Energy (in its September 1, 2006 submission (at 2)) concerning whether emission reductions from the Exeter boilers would be highly cost effective or feasible and whether existing emissions are small and concerning the treatment of Exeter under other NO_x trading programs are not relevant to the application of the applicability criteria for the CAIR NO_x Ozone Season Trading Program.

78. If you have any questions regarding this determination, please contact Travis Johnson at (202) 343-9018. Thank you for your continued cooperation.

Sincerely,

Sam Napolitano, Director
Clean Air Markets Division

cc: Travis Johnson, EPA CAMD
Ian Cohen, EPA Region 1
Wendy Jacobs, CTDEP