PCA

Portland Cement Association

August 18, 2011

Honorable Mathy Stanislaus
Assistant Administrator Solid Waste and Emergency Response
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Portland Cement Association ("PCA") Petition to Amend Non-Hazardous Secondary Materials ("NHSM") Rule, Filed June 16, 2011

Dear Mr. Stanislaus:

Thank you for taking the time to meet with me and others from PCA regarding our above-referenced NHSM rulemaking petition on August 4. Based on questions and points you and other EPA personnel raised during the meeting, we would like to follow up with further elaboration, as set forth below.

Need for Coordination on Commercial and Industrial Solid Waste Incinerator (CISWI) Rulemaking and Response to PCA's NHSM Administrative Petition

In our NHSM rule administrative petition, we stated (on page 2):

> Since the CISWI and NHSM rules are so closely linked – in fact, the entire foundation for CISWI applicability over a facility rests entirely on the NHSM rule – we believe EPA should consider amendments to key provisions of the NHSM rule as EPA reconsiders the CISWI rule.

We appreciated having representatives of EPA's Office of Air and Radiation (OAR) and an Office of General Counsel (OGC) CAA attorney participate with you and your Resource Conservation and Recovery Act (RCRA) staff in our August 4 meeting. We suggested at that meeting that since EPA has announced plans to issue a new proposed CISWI rule by the end of October, 2011, EPA's response to our NHSM petition could be folded into that CISWI rulemaking.

To follow up on that suggestion, we are sending a letter today (copy attached) to Ms. Gina McCarthy, OAR's Assistant Administrator. We are also sending Ms. McCarthy a copy of this letter to you.

As you will see in our letter to Ms. McCarthy, PCA filed a petition for reconsideration of the CISWI rule on May 20, 2011. The first issue we raised in our CISWI petition is identical to the first issue raised in our NHSM petition: ingredients utilized by portland cement kilns are not "combusted," and therefore such ingredients cannot be deemed a "solid waste" under the NHSM rule and cannot be subject to the CISWI rule under CAA § 129.

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As we discussed in our August 4 meeting (and explained in both our NHSM and CISWI petitions), Administrator Jackson has already resolved that issue in a recent final Federal Register ruling. 76 FR 28322, May 17, 2011. We also pointed out that even though Administrator Jackson's ruling definitively resolves this issue, it is important that EPA now clarify the CISWI and NHSM rules on this point.

Ms. Jackson's Federal Register ruling will not be codified in the C.F.R., but the CISWI and NHSM rules will. While nothing in the NHSM or CISWI rules contradicts these points, the rules do not expressly state them. For the benefit of the regulated community, state and regional personnel, and all interested parties, we believe it is incumbent upon EPA to clarify both rules on these points.

To this end, we provided suggested regulatory language in an Addendum to our NHSM administrative petition. In today's letter to Ms. McCarthy, we suggest that similar or alternative language should be added to the CISWI rule.

In today's letter to Ms. McCarthy, we also elaborate upon the suggestion we raised in our August 4 meeting with you that the upcoming CISWI preamble could reference and notice PCA's NHSM petition. PCA's NHSM administrative petition was filed pursuant to RCRA § 7004(a). This subsection of RCRA requires that EPA take action in the Federal Register with respect to any such petition within a reasonable time.

In light of the extremely close relationship between the CISWI and NHSM rules, we believe it would be most appropriate for EPA to comply with its RCRA § 7004(a) obligations in this manner. EPA would then be procedurally postured to take final action on the NHSM petition at the same time it finalizes its CISWI rules. This coordination would be consistent with EPA's earlier approach of issuing the NHSM and CISWI rules in tandem.

Follow Up on Points Raised in August 4 Meeting

– Processing

We repeated points made in our NHSM petition showing how EPA's approach to "processing" was, in our view, unnecessarily stringent and would discourage beneficial recycle/reuse of non-hazardous materials with no benefit to human health and the environment. We also pointed out that even if one were to concede (which we do not) that some D.C. Circuit case law under RCRA Subtitle C required the Subtitle D NHSM rule's approach to "discard," there is no case law (or statutory language) requiring the NHSM rule's approach to "processing."

Using tires as an example, EPA personnel asked what level of processing for whole tires from landfills and piles would we consider sufficient? EPA personnel wondered whether *anything* would be necessary in our view.

The justification for the requirement for processing as expressed in EPA's preambles is to assure that a discarded material can be processed to a sufficient degree so that it can serve as a bona fide fuel material. We believe that if only a minimal amount of processing is necessary to make a certain type of "discarded" material a bona fide fuel (such as a whole tire), then as a matter of logic, only a minimal amount of processing should be necessary.

In the draft regulatory language accompanying our NHSM petition, we made clear that (contrary to EPA's current approach) shredding and metal removal would not be necessary for whole tires. We included several other types of actions, however, such as: removal of extraneous debris, sizing for safe and efficient handling, sorting, segregating, cleaning, culling, racking, and "other systematic procedures for making a material ready for use as a fuel." Thus *something* would be required under our approach.

If some might consider this minimal, that is because only minimal processing is necessary to render a whole tire usable as a bona fide fuel in a cement kiln. And there clearly can be no health and environmental justification for EPA's current approach, since the NHSM rule excludes whole tires that have been subject to neither shredding nor metal removal if the tires come to a kiln through an "established program."

As noted above, the tire derived fuel example was used for illustrative purposes. The cement sector utilizes a long list of alternatives to conventional fuels, most of which are acquired from off site and much of which generally require little processing to be effectively utilized (sizing for insertion into the kiln being the most common). Unnecessarily stringent processing requirements should not impede the use of alternative fuels.

– <u>"Traditional" Fuels</u>

We pointed out during the meeting (and explained further in our NHSM petition) that portland cement kilns have been utilizing tires on a routine basis since the 1980s, and that EPA should classify tires as "traditional" fuels. EPA personnel asked for our views on how lines could be drawn in determining how long a fuel must have been used to be considered "traditional."

As in the case of "processing," there is no relevant statutory language or D.C. Circuit case law that restrains EPA's discretion on this issue. We note further that the first part of EPA's two-part regulatory definition of "traditional" uses the word "historical" but does not define that term. 40 C.F.R. § 241.2, 76 FR at 15550. The second part of the definition discusses alternative fuels from virgin materials that can "now" be used as fuels, and does not require any "historical" use. We believe in this statutory/regulatory setting, EPA has ample leeway to classify tires as 'traditional" fuels where such classification with promote recycle/reuse of secondary materials and have no impact on human health and the environment.

– <u>The 2007 D.C. Circuit *NRDC* Opinion</u>

Some EPA personnel noted that if EPA amended the NHSM rule as we are requesting, most if not all material combusted as fuel by portland cement kilns would be excluded from the definition of solid waste (and therefore CISWI coverage), and this could appear contrary to the result in *NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007). They expressed concern that the D.C. Circuit would view this as somehow inconsistent with their 2007 opinion.

We explained in our NHSM petition (as well as our rulemaking comments) that EPA's discretion to exclude materials from the definition of solid waste through the RCRA NHSM rulemaking was in no way constrained by *NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007). Section 129(g)(1) of the CAA provides (with specified exceptions) that any facility that combusts any "solid waste" will be subject to CAA § 129. Section 129(g)(6) then provides that "solid waste" shall have the meaning established by the Administrator pursuant to RCRA.

In the 2000 CISWI rulemaking (65 Fed. Reg. 75338) leading up to the *NRDC* case, EPA had not attempted to exclude any non-hazardous material combusted for energy recovery from the definition of "solid waste" pursuant to RCRA. EPA had engaged in no RCRA rulemaking related to CISWI at all.

Rather, EPA's CISWI rule simply provided that facilities combusting solid waste for energy recovery would not be subject to CISWI. *Id.* at 1256. It is easy to see how the D.C. Circuit could come to the conclusion that the rule "conflicts with the plain language of section 129." *Id.* at 1257. The rule said that material which could arguably be considered a "solid waste" would nevertheless be exempt from CAA § 129.

EPA has now – quite properly – engaged in rulemaking under RCRA. There is absolutely nothing in the *NRDC* opinion that constrains EPA's discretion in defining solid waste under RCRA. In the RCRA rulemaking EPA can – as it has done – provide that certain materials managed in certain ways will not be deemed solid wastes for purposes of triggering CAA § 129. In fact, a vast amount of material that EPA attempted to exclude through its prior CISWI rulemaking is now excluded through the current NHSM rule. And that material is most clearly combusted for energy recovery.

Certainly, the fact that a court has rejected a result an agency has reached through improper legal avenues does not mean the agency is precluded from later reaching the same result through proper legal avenues. We find that proposition rather unremarkable, and cannot imagine why the D.C. Circuit would have any problem with such a proposition. We note that just two months ago, the Supreme Court found it entirely appropriate to give effect to an FCC order that had previously been rejected on judicial review when the FCC "found another way to support that same conclusion." *Talk America, Inc. v. Michigan Bell Telephone*, 131 S.Ct. 2254, 2264 (June 9, 2011). EPA's RCRA rulemaking will stand or fall in the D.C. Circuit based on the rulemaking record and EPA's articulation of its rationale, and we are confident that EPA can articulate solid rationale for excluding bona fide fuels in a manner that serves the purposes of RCRA Subtitle D.

– <u>"Concept Paper" for Legitimacy Criteria Comparable Contaminants</u>

PCA appreciates the opportunity provided by EPA to review the concept paper you distributed at the meeting, which is posted on EPA's Web site and dated July 11, 2011. http://www.epa.gov/epawaste/nonhaz/define/pdfs/nhsm-concept.pdf. While we do believe that the grouping of contaminants by type is a step in the right direction, we struggle with the application of the guidance in practice at cement plants. As we have indicated on numerous occasions, cement plants are capable of using a long list of alternatives to conventional fuels. These fuels, like conventional fuels, are combusted to provide the necessary process heat to produce clinker, the intermediate cement product. The process temperatures are such that organic compounds present in fuels are fully combusted (greater than 99.99% destruction), whether they are contained in conventional or traditional fuels. Accordingly, PCA struggles with the approach outlined in the concept paper which would require a contaminant comparison between alternative and "traditional" fuels *prior* to combustion. For example, some alternative fuels may have a higher concentration of one or two organic compounds when compared to a traditional fuel, though this difference becomes irrelevant once the fuel is combusted in the kiln.

PCA believes that the focus should be on whether the utilization of an alternative fuel impacts a facility's ability to comply with the underlying air emission standards. This very burden of proof is already a part of the portland cement national emission standard for hazardous air pollutants (NESHAP), where the operator must determine whether (or not) to re-test a kiln to confirm compliance with an air emission standard when switching fuels.

This makes sense, as the issue in question is whether the use of a non-hazardous alternative fuel will impact air quality. PCA believes that the approach currently employed under the NESHAP could also be employed here, especially in light of the fact that the focus in on *non-hazardous* materials in the first instance. In implementing such an approach, PCA believes it would be highly appropriate for cement plants to consider groups of pollutants, rather than individual pollutants, as has been suggested in the concept paper for contaminants in fuels pre-combustion.

Moreover, EPA has already come to this very conclusion regarding scrap tires managed through an established program. EPA has determined that these tires can be deemed to pass the legitimacy criteria. PCA suspects that the Agency may have come to this conclusion having had the opportunity to review the comparative air emission analysis prepared by PCA addressing tire combustion in kilns which demonstrated that the emissions when burning tires versus when burning only conventional fuels are virtually indistinguishable.

Lastly, we note that if EPA does plan to issue some type of comparable contaminant guidance, this should be offered up as an official change to the NHSM rule and be accomplished through normal notice and comment rulemaking. PCA continues to believe, however, that the legitimacy criteria in the NHSM rule for non-hazardous fuels are unnecessary and regulatory overkill for the materials in question.

Please do not hesitate to contact me with any questions regarding PCA perspectives on this matter. I may be reached at (202) 408-9494 or aohare@cement.org.

Sincerely,

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