



Portland Cement Association

August 18, 2011

Honorable Gina McCarthy
Assistant Administrator for Air and Radiation
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Upcoming Rulemaking for Commercial and Industrial Solid Waste Incineration Units ("CISWI"); Need for Coordination on Non-Hazardous Secondary Material ("NHSM") Issues

Dear Ms. McCarthy:

Background: CISWI and NHSM Rules and Administrative and Judicial Review Status

On May 20, 2011, the Portland Cement Association (PCA) filed an administrative petition for reconsideration of the final CISWI rule. 76 FR 15704, *et seq.*, March 21, 2011. Other parties have filed administrative petitions. PCA and other parties are also seeking judicial review of the final CISWI rule in the D.C. Circuit. These cases are consolidated under the lead case name *American Forest & Paper Assn. v EPA*, Nos. 11-1125 *et al.*

As you are aware, EPA announced a CISWI reconsideration process when it issued the final CISWI rule. Then on May 18, 2011, EPA announced a stay of the effectiveness of the CISWI rules during the reconsideration process and judicial review processes. 76 FR 28622, *et seq.*

On June 24, 2011, EPA filed a Reply in the consolidated D.C. Circuit CISWI litigation referenced above. In that Reply, EPA informed the D.C. Circuit that EPA currently planned to issue a new proposed rulemaking pursuant to the CISWI reconsideration by October 31, 2011, and a new final CISWI rule by April 30, 2012.

The CAA CISWI rule is intimately connected to the "Non-Hazardous Secondary Material" ("NHSM") rule EPA issued under the Resource Conservation and Recovery Act (RCRA) the same day EPA issued the final CISWI rule. 76 FR 15456 *et seq.*, March 21, 2011. On June 16, 2011, PCA filed an administrative petition for new rulemaking to amend the NHSM rule. Other parties have filed administrative petitions, and PCA and other parties are seeking judicial review of the NHSM rule in the D.C. Circuit. These NHSM cases are consolidated under the lead case name *Waste Management, Inc. v EPA*, Nos. 11-1148 *et al.*

Need for Coordinated Response on CISWI and PCA's NHSM Administrative Petition

In our June 16 NHSM rule administrative petition, we stated (on page 2):

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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.

The purpose of this letter is to follow up on our request for this CISWI/NHSM coordination with you, as head of EPA's Office of Air and Radiation (OAR). On August 4, we met with Mathy Stanislaus and others on his RCRA staff within the Office of Solid Waste and Emergency Response (OSWER) to discuss our NHSM rule administrative petition, and we stressed the appropriateness of such coordination during that meeting. You will see that we are copying Mr. Stanislaus on this letter to you. We are also sending a separate letter to Mr. Stanislaus today to follow up on several points raised during our August 4 OSWER meeting, and I attach a copy of that letter for your convenience.

– Ingredients Not “Combusted”

We believe one critical issue – which has already been resolved by Administrator Jackson in a recent final Federal Register ruling – requires amendments to both the CISWI and NHSM rules. This is the first issue we raise in both our CISWI and NHSM administrative petitions: 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.

In her recent final ruling, Administrator Jackson acknowledged that CAA § 129 applies only to materials that are “combusted,” and that “none of these secondary ingredient materials identified by PCA as being used in cement kilns is considered to be combusted.” Therefore, she ruled, “none of the cement kilns would have been potentially CISWI due to the use of secondary material ingredients.” 76 FR 28322, May 17, 2011.

Even though Administrator Jackson's final Federal Register 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. The suggested regulatory language would reflect Administrator Jackson's ruling that the types of NHSM ingredients used by PCA members are not “combusted” in portland cement kilns.

We suggest that similar language could be added to the CISWI rule. Or the CISWI rule could more simply be amended to state that utilization of secondary ingredients by portland cement kilns shall not be subject to the rule, with perhaps a cross-reference to the appropriate (amended) provision of the NHSM rule.

– Additional NHSM Issues

Our NHSM petition raises several additional issues which, if EPA agrees with our points, would not require further amendments to the CISWI rule. As explained below, however, we believe the upcoming CISWI proposed rule preamble should include a discussion of these issues for public comment.

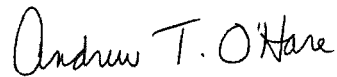
In the Upcoming CISWI Proposed Rule, EPA Should Reference, and Solicit Public Comment Upon, PCA's Pending NHSM Rule Administrative Petition

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 RCRA rules, we believe it would be most appropriate for EPA to comply with its RCRA § 7004(a) obligations by referencing and noticing PCA's NHSM petition in the CISWI proposed rule preamble. In this manner, EPA could 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. We make this same suggestion in our separate letter to Mr. Stanislaus today (copy attached).

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,



Andrew T. O'Hare
Vice President, Regulatory Affairs

Cc: Mathy Stanislaus, OSWER
Peter Tsirigotis, OAQPS
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