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August 7, 2009

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Mr. Matthew Hale, Director
Office of Resource Conservation & Recovery
U.S. EPA (5301P)
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Concerns Over "Stigma" for Coal Combustion Products

Dear Matt:

Thank you for agreeing to meet with representatives of my client, Lafarge North America, Inc., and me on August 18 to discuss Lafarge's concerns regarding EPA's development of RCRA regulations for coal combustion waste (CCW). You probably know that Lafarge is a major manufacturer of Portland cement and related construction products. You may not know, however, that Lafarge also utilizes, manages, and markets coal combustion products (CCPs) in the U.S.

During our meeting, we can describe Lafarge's CCP practices. In advance of that meeting, however, we would like stress certain points for your consideration, as we recognize that you and ORCR staff are working to meet the agency's goal of publishing a proposed rule by the end of 2009.

Lafarge's primary concern is the potential for EPA's rules to present a barrier to beneficial reuses of CCW. As you may recall, EPA's Bevill Determination for CCW in 2000 was based in significant part on EPA's desire to avoid placing "barriers on the beneficial uses of coal combustion wastes so they can be used in applications that conserve natural resources and reduce disposal costs." 65 FR at 32221, May 22, 2000.

We understand that EPA may be considering proposing RCRA Subtitle C controls on the disposal of CCW, while exempting (either wholly or conditionally) some types of CCP uses from the Subtitle C regime. Lafarge is quite concerned about any approach that would classify disposed CCW as a Subtitle C hazardous waste. Lafarge believes that any type of Subtitle C coverage for CCW would place a "stigma" on all CCW and CCP, and would impose a significant deterrent on CCP beneficial use practices.

In its 2000 Determination EPA stated that it would be "particularly concerned" about any adverse effect on beneficial re-use markets, noting that more than 23 percent of the total CCW

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generated each year is beneficially reused. *Id.* At 32217. Nine years later, in part due to EPA's choice not to subject CCW and CCP to the stigma of hazardous waste, more than 40 percent of CCW is beneficially reused.

We believe it is now more important than ever to avoid stigmatization that would deter CCP usage. The name of the statute is, after all, the Resource Conservation and Recovery Act. Any CCW that is no longer destined for beneficial reuse will be destined instead for landfill disposal – a result that would defeat a major purpose of RCRA.

Response to Public Interest Groups' Arguments Regarding Lack of Stigma

(1) Other Recycled Products

On June 5, 2009, several public interest groups sent a letter to every member of Congress arguing, in effect, that fears of “stigma” for CCPs are speculative and overblown. A copy of their letter is attached. They assert that Subtitle C regulations for CCW “can simultaneously promote coal ash recycling and protect the public and environment” because EPA's regulations could classify disposed CCW as a hazardous waste yet treat CCP “as a non-hazardous product when it is safely recycled.”

They assert: “EPA has made these distinctions many times before without damaging the market for recycled products.” While this assertion may generally be correct regarding the types of “recycled products” that EPA has excluded from Subtitle C, it is wholly inapplicable to the situation of CCW and CCP. As explained below, CCPs – and the markets for CCPs – are significantly different from the recycled products to which the public interest groups refer.

The hazardous wastes from which recycled products are derived include waste solvents, spent sulfuric acid, and metal-bearing waste. These materials almost always require significant processing, distillation, chemical treatment, or smelting to be turned from a waste into a product. In most situations the end product is still a hazardous material under various federal and state laws and is sold back into a market that is otherwise purchasing hazardous materials – with all of the risks and associated management practices that purchasers would be using to handle equivalent virgin materials.

For instance, waste solvents are recycled using various forms of distillation that remove contaminants and render the solvent suitable for reuse. Often they are sold back to the same companies that generated them as wastes in the first place. Most are still considered hazardous under DOT shipping regulations and users handle them as hazardous materials just as they would virgin solvents.

Sulfuric acid is recycled by feeding it to a furnace where it is thermally broken down and then reconstituted as sulfuric acid, indistinguishable from the sulfuric acid produced from other sources of sulfur. Obviously sulfuric acid is then sold into the market as a hazardous material.

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Metal bearing hazardous waste is often fed to smelters where the metals are thermally extracted from contaminants. Alternatively, some metals are recycled by using chemical extraction and purification methods. Such metals are resold into the chemical market place – often as hazardous materials depending on the nature of the metal or metal salt. Some of these recycled metal salts are used in fertilizers but they must meet strict controls on contamination.

A very small fraction of waste solvents are “clean” enough to fall into RCRA’s “comparable fuel” exemption where they are burned in an industrial boiler, often at the same site where they are generated. 40 C.F.R. §261.38. This exemption does not eliminate the fact that these materials often continue to be treated as hazardous materials since they are frequently flammable and some are considered toxic. They can only be used as “products” in certain types of industrial boilers, and they do not openly enter a commodity-based nationwide market place.

The contrasts these recycled products present to the CCP situation are stark and vivid. First, in virtually all of these recycled product situations, the product is readily distinguishable chemically and physically from the hazardous waste used to produce the product. Recycled solvent product is not the same material as a waste solvent, and recycled sulfuric acid is not the same material as spent sulfuric acid. In almost all cases of CCP utilization, however, the CCP is exactly the same as CCW physically and chemically – the CCW goes through no distillation, processing, smelting, etc. before it becomes CCP.

Second, products from recycled hazardous waste typically are utilized only in industrial settings, and in situations where both the recycled product and the virgin product for which it substitutes are clearly hazardous materials. Users fully understand and expect the product to be a hazardous material and are equipped to manage the materials as hazardous. This is absolutely not the situation with CCPs. CCPs have a wide variety of beneficial uses in non-industrial settings (including home building) in which users are not accustomed to handling or accepting materials that have been designated hazardous – especially hazardous wastes. Moreover, there are readily available alternatives to CCPs available in the market place which are not associated with any hazardous waste designation.

Thus, if EPA listed disposed CCW as a hazardous waste, potential CCP users would be confronted with the fact that exactly the same material they could choose to use has been officially declared a hazardous waste. While EPA’s regulations might say that CCP used beneficially is not a hazardous waste, the plain and simple fact would be that the CCP material would be physically and chemically the same as a hazardous waste. When there are plenty of substitute materials available that do not carry this baggage, it is obvious that consumers would be highly motivated to avoid the CCP. As explained above, the same facts simply do not apply to the recycled solvent and similar situations, so the public interest groups’ argument simply misses the point.

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(2) CERCLA Hazardous Substances

Public interest group representatives have also argued that since the passage of CERCLA in 1980 all CCW and CCP contains CERCLA “hazardous substances,” and that has not resulted in any stigma that has deterred CCP usage. That argument is equally unpersuasive and unavailing.

There is hardly any material that does not contain CERCLA hazardous substances, including natural soils and trees. Moreover, CCW is not listed as a CERCLA hazardous substance, it simply contains some of the substances on the list. This pales by comparison to the impact of having a material explicitly named on EPA’s list of RCRA hazardous wastes.

We should also note that while this is not rational, in the minds of the general public any combination of the words “hazardous waste,” “toxic waste,” or “chemical waste,” conjures up the specter of Love Canal, the Valley of the Drums, cancer, birth defects, and worse. This public phobia regarding hazardous wastes is also manifested in many judicial decisions.

In many states, established judicial precedent holds that hazardous wastes are “abnormally dangerous” or “ultra hazardous,” giving rise to “absolute” liability.¹ Judges deciding cases involving alleged injury from hazardous wastes have been quick to hold defendants liable. Some of the more colorful opinions have referred to hazardous waste as a “Frankenstein monster”² and as posing “the same threat to health and welfare today as the detonation of dynamite.”³

These cases did not deal with a situation in which EPA had listed a material as a hazardous waste when disposed, but not when used as a product. But in alleging a CCP had caused a personal injury, plaintiffs’ lawyers could obtain an advantage if they could show that the material in question is exactly the same material physically and chemically as a listed RCRA hazardous waste. Once they show that, they can start quoting cases about Frankenstein monsters and dynamite.

We do not endorse or support these doctrines or cases, of course, but plaintiffs’ lawyers are certainly aware of them. And since prospective purchasers and users will presumably want to minimize their risks of tort liability, they will have great incentive to avoid purchasing or using the “monster” in the first place.

* * * * *

¹ *E.g.*, *New Jersey v. Ventron*, 468 A.2d 150 (N.J. 1983).

² *Kenney v. Scientific*, 407 A.2d 1310, 1320 (N.J. Super. Ct. Law Div. 1985).

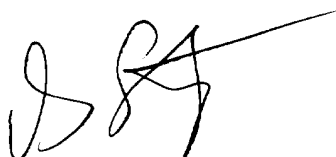
³ *Schwartzman v. Atchison, Topeka & Santa Fe.*, 842 F.Supp. 475, 479 (D.N.M. 1993).

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It is thus entirely logical and reasonable to expect that when purchasers and users of products are presented with a choice between a material which – in exactly the same physical and chemical form – has been officially designated as an EPA hazardous waste and a material which has not been so designated, that purchasers and users would choose the latter. We hope you and others at EPA will consider these concerns most seriously.

Very truly yours,

A handwritten signature in black ink, appearing to be 'RGS', with a long horizontal line extending to the right from the end of the signature.

Richard G. Stoll

cc: Robert M. Sussman
Mathy Stanislaus
Barry Breen