

June 8, 2012

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: The Regulatory Status of Gases that are not Contained in a Container

Dear Assistant Administrator Stanislaus:

We would like to bring to your attention an issue of significant concern to all of the undersigned representatives of manufacturing facilities, energy generation facilities, waste management facilities, and wastewater treatment plants. We recently learned that EPA is refusing to advise state regulators that gases that are not contained in a container are not solid wastes, notwithstanding the Agency's long-standing position that such gases are not solid wastes; the April 13, 2011, letter from Suzanne Rudzinski, Director, Office of Resource Conservation and Recovery to Tim Hunt, American Forest & Paper Association; and the preamble discussion of this issue in the December 23, 2011, Reconsideration and Proposed Amendments to the Commercial and Industrial Solid Waste Incineration (CISWI) Rule and the Non-Hazardous Secondary Materials (NHSM) Rule.

EPA created confusion over the regulatory status of gases that are not contained in a container in a response to comments document accompanying the March 2011 NHSM Rule. Realizing its mistake, EPA clarified the status of such gases in both the April 13, 2011 letter and the December 23, 2011, preamble. In these documents, EPA affirmatively states that the "burning of gaseous material, such as in fume incinerators (as well as other combustion units, including air pollution control devices that may combust gaseous material) does not involve treatment or other management of a solid waste (as defined in RCRA section 1004(27))."

Following release of the April 13, 2011 letter, the regulated community thought the issue of what is a contained gas was settled. However, we now learn that it may not be. Notwithstanding this letter, it is our understanding that EPA has refused to clarify to North Carolina air pollution control regulators that the burning of gaseous fuel derived from landfill gas and the combustion of gases in flares is not the burning of a solid waste. As a result, North Carolina has determined that such burning may be the combustion of a solid waste, suggesting that a flare would have to meet CISWI standards and a gaseous fuel would have to meet the processing and legitimacy criteria of the NHSM Rule.

For example, in addition to confusion over permits for landfills, we are aware of one title V permit application for a flare in North Carolina that has been halted over this issue. The subject permit application is for temporary short-term incineration of HVLC gases (2-3 weeks). Without an alternative source of control during this one-time maintenance event, the facility would have to cease operation and the cost of lost production revenue could be as much as \$6 million. Add to that the repercussions of potential loss of customers looking elsewhere for product when the manufacturing facility is down and the effects could be permanent. Further, if the state extends its new interpretation of “contained gaseous materials” to the primary units that control these types of gases, then facilities all over the state may have to shut down. Finally, if this state and others apply the same interpretation to all combustion of gases, the implications across all manufacturing sectors will be enormous. See the attached email exchanges with North Carolina regulators.

Also attached is a May 2, 2012 Questions and Answers document that is posted on the North Carolina web site. As you can see from this document, North Carolina relies on both an August 5, 2011, letter from Suzanne Rudzinski to Sue Briggum of Waste Management, as well as the response to comments document accompanying the March 21, 2011 Non-Hazardous Secondary Materials Rule to reach the conclusion that gases that are not contained in a container may still be solid wastes. The attached documents highlight the importance of clarifying that *all* gases are not solid wastes unless combusted while in a container. EPA needs to clarify that this is the position of the Agency not only under the Clean Air Act, but also under RCRA.

Please be aware that EPA’s unwillingness to provide clarification to state regulators regarding the RCRA status of gaseous materials is an issue that goes far beyond landfill gas. As demonstrated by the reaction of North Carolina regulators, discussed above, a statement by EPA that one gas that is not contained in a container is a solid waste brings into question the status of all such gases, and the regulatory status of the units in which they are combusted.

It is our understanding that some at EPA have attempted to distinguish landfill gas from other uncontained gases by referencing the attached March 6, 1986, letter from Marcia Williams, Director, Office of Solid Waste, to Mr. Lanier Hickman, Executive Director, Governmental Refuse Collection and Disposal Association. However, that letter provides no basis for an EPA determination that landfill gas is a solid waste when combusted. In fact, in Volume U of the RCRA Definition of Solid Waste Compendium, this letter is included in the subtopic “un-contained gases” so it is clear that EPA has not interpreted this letter as authority for determining that landfill gas is solid waste.

Instead, the 1986 letter responds to a question regarding the regulation of gaseous emissions from both hazardous and non-hazardous waste landfills. The letter asserts the authority to regulate such emissions, relying on 3004(n) and 4004(a) of RCRA.

Section 3004(n) is stand-alone authority for EPA to promulgate regulations controlling air emissions from hazardous waste treatment, storage, and disposal (TSD) facilities. This section of RCRA does not identify such emissions as solid wastes and the authority granted under this

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section of the statute is completely independent of EPA's authority over solid wastes. EPA regulations promulgated under this authority do not purport to identify gases as solid wastes.

Section 4004(a) is stand-alone authority for EPA to promulgate regulations establishing criteria for sanitary landfills. This section of RCRA does not discuss gaseous emissions, much less identify them as solid wastes. EPA regulations promulgated under this section of RCRA require the control of explosive gases and compliance with the Clean Air Act. They do not purport to identify gases as solid wastes. If EPA now believes that this section of RCRA represents a determination that gases generated in landfills are solid wastes, then landfills would have to cease flaring methane gas, unless the flares comply with the 2000 CISIW Rule.

This issue has enormous consequences for the undersigned sectors of our nation's economy. Thousands of facilities are operating today based on EPA's interpretation of the definition of contained gaseous material in the April 13, 2011, letter to Tim Hunt. This interpretation is now being called into question and EPA cannot let the present ambiguity continue. Should EPA define a gas that is not in a container a solid waste, then EPA will shut down significant portions of the manufacturing sector, disrupt the management of sanitary landfills and wastewater treatment plants, and potentially eliminate the future ability of communities and facilities to derive energy from landfill gas as well as biogas generated during wastewater treatment. The same consequences will result from EPA inaction and refusal to clarify what constitutes a contained gas.

Given the fact that this issue is impacting pending permit applications, we respectfully urge you to immediately make it clear to state regulators and the regulated community in the forthcoming CISWI and NHSM rules that, for all gases, neither a combustion device nor a conveyance such as a pipe or duct that delivers gas to a combustion device constitutes a container, and that a gas that is not contained in a container cannot be considered a solid waste under RCRA and is not subject to regulation under the Clean Air Act Section 129 incinerator rules when combusted.

Thank you for your consideration of this issue.

Sincerely,

American Chemistry Council
American Coke and Coal Chemicals Institute
America Forest & Paper Association
American Foundry Society
American Iron and Steel Institute
American Petroleum Institute
American Wood Council
Brick Industry Association
Celanese Corp.
Council of Industrial Boiler Owners
Delaware Solid Waste Authority

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KapStone Paper and Packaging Corporation
Manufacturers and Chemical Industry Council of North Carolina
National Association of Clean Water Agencies
National Solid Wastes Management Association
Portland Cement Association
Rubber Manufacturers Association
The County Sanitation Districts of Los Angeles County
Utility Solid Waste Activities Group
Waste Management

cc: Robert Perciasepe, EPA
Suzanne Rudzinski, EPA
James Berlow, EPA
Peter Tsirigotis, EPA
David Cozzie, EPA
Kevin Neyland, OMB
Dominic Mancini, OMB
Kevin Bromberg, SBA

Attachments:

NC Email on Landfill Gas, April 26, 2012 from Sheila Holman
NC Landfill Gas Q&A, May 2, 2012
NC Email on Flares, June 1, 2012 from Donald Vandervaart