

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

WASTE MANAGEMENT, INC.,

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

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) **No. 11-1148**
) **(and consolidated cases)**
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Joint Motion to Set Briefing Schedule and Format

In accordance with the Court's Order of October 16, 2013 (Doc. 1461584)

Industry Petitioners,¹ Environmental Petitioners,² and Respondent United States

¹ Industry Petitioners in Case No. 11-1148 (and consolidated cases) are American Chemistry Council, American Forest & Paper Association, American Gas Association, American Home Furnishings Alliance, Inc., American Petroleum Institute, American Wood Council, Association of American Railroads, ARIPPA, Auto Industry Forum, Biomass Power Association, Cement Kiln Recycling Coalition, CEMEX, Inc., Coalition for Responsible Waste Incineration, Council of Industrial Boiler Owners, Edison Electric Institute, Hardwood Plywood and Veneer Association, Hatfield Township Municipal Authority, Holcim (US) Inc., Lafarge Building Materials, Inc., Lafarge Midwest Inc., Lafarge North America, Inc., National Association of Clean Water Agencies, National Association of Manufacturers, National Rural Electric Cooperative Association, Portland Cement Association, Railway Tie Association, Rubber Manufacturers Association, Solvay USA Inc., Treated Wood Council, Utility Solid Waste Activities Group, Waste Management Inc., and WM Organic Growth, Inc.

Environmental Protection Agency (“EPA”) hereby submit this proposal to set a briefing schedule and format in the above-captioned proceeding.³ Counsel for Intervenor in Case No. 11-1148 (and consolidated cases) have been contacted and none opposes this motion.

On August 6, 2013, EPA filed a Motion to Govern Further Proceedings requesting, among other things, that the Court order the parties to submit a proposed schedule and format for briefing by September 17, 2013. On October 16, 2013, the Court directed the parties to submit proposed briefing formats within 45 days.⁴ The parties have conferred and reached consensus on a briefing schedule. As noted below, the parties have not reached consensus on the length of some of the briefs. The parties are submitting this motion jointly, which includes a

² Environmental Petitioners in Case No. 11-1148 (and consolidated cases) are Clean Air Council, Desert Citizens Against Pollution, Downwinders At Risk, Environmental Integrity Project, Huron Environmental Activist League, Louisiana Environmental Action Network, Montanans Against Toxic Burning, Partnership for Policy Integrity, and Sierra Club.

³ These consolidated cases address petitions for review of both the March 21, 2011 final rule entitled “Identification of Non-Hazardous Secondary Materials That Are Solid Waste,” 76 Fed. Reg. 14,456 (Mar. 21, 2011) (codified at 40 C.F.R. Part 241) and the amendments to 40 C.F.R. Part 241 in the final rule entitled: “Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste; Final Rule,” 78 Fed. Reg. 9112 (Feb. 7, 2013) (collectively referred to as the “NHSM Rule”).

⁴ Counsel for Industry Petitioners have given consent to Counsel for American Forest & Paper Association, et al. to sign this motion on their behalf.

consensus proposal for the briefing schedule and alternative proposals for the length of briefs, in the interest of expediting the proceedings.

1. Briefing Format

a. Petitioners' Opening Briefs. The parties propose that Industry Petitioners file a single opening brief and Environmental Petitioners submit a single opening brief. The parties propose that each brief be limited to 14,000 words. Intervenor-Petitioners will not file a separate brief.⁵

In support of their request to file a separate opening brief with a limit of 14,000 words Industry Petitioners state as follows: The brief for the 33 Industry Petitioners and three Intervenor-Petitioners must cover the application of the NHSM Rule to parties from a wide variety of industries. Petitioners and Intervenor-Petitioners include parties that produce and combust secondary material themselves or within their industry; parties that transfer the secondary material they produce to third parties that use it to replace other fuels; parties that transfer their secondary material to third parties that process the secondary material into fuel that is sold in commerce; parties that are in the business of processing secondary material into fuel; and parties that utilize the fuel that is made from secondary materials. These parties are affected by the NHSM Rule in disparate ways. Further, Industry Petitioners will need to provide the mandatory sections of

⁵ Intervenor-Petitioners are American Petroleum Institute, Metal Industries Recycling Coalition., and Rubber Manufacturers Association.

the brief that count towards the word limit. See Fed. R. App. P. 28(a)(4)-(8), 24(a)(9)(B); D.C. Circuit Rule 28(a)(6)-(7). A joint brief with 14,000 words will allow Industry Petitioners to address the industry-specific and site-specific impacts of the NHSM Rule.

In support of their request to file a separate opening brief with a limit of 14,000 words Environmental Petitioners state as follows: Environmental Petitioners intend to challenge as unlawful EPA's interpretation of the Resource Recovery and Conservation Act (RCRA) as allowing it to exclude from the definition of solid "waste" materials that are burned instead of being used for their intended purpose. Environmental Petitioners also intend to challenge several specific exclusions as unlawful and arbitrary. Among these are exclusions for: (1) wastes that are processed before they are burned; (2) wastes that are burned at a facility owned or operated by the same company that generated them; (3) whole tires; (4) used oil; (5) coal refuse; (6) resinated wood wastes; (7) pulp and paper sludge; (8) construction and demolition waste; (9) coal combustion residuals (fly ash, bottom ash and boiler slag). In addition, Environmental Petitioners intend to challenge EPA's exclusion of wastes it regards as "traditional fuels," including asphalt and various wastes from the petroleum refining process. Environmental Petitioners also intend to challenge EPA's petition process by which companies can obtain a "non-waste" determination for wastes they wish to burn. All of these

challenges involve, to some extent, distinct legal and record-based arguments.

Further, Environmental Petitioners will need to provide the mandatory sections of the brief that count towards the word limit. *See* Fed. R. App. P. 28(a)(4)-(8), 24(a)(9)(B); D.C. Circuit Rule 28(a)(6)-(7). Environmental Petitioners respectfully submit that they will need 14,000 words to adequately brief the issues they will raise.

b. Respondent's Brief. The parties propose that Respondent EPA will submit a response brief of 28,000 words. In support of its request to file a Respondent Brief of 28,000 words EPA states as follows: As outlined herein, the Industry petitions involve multiple petitioners representing varied industries who claim to be affected by the subject rules in many disparate and varying ways, and in addition involve a multitude of issues raised by the Environmental Petitioners. Accordingly, EPA believes it needs a matching number of words as that provided in total to the two sets of Petitioners (Industry and Environmental) in order to adequately address the many unique issues likely to be raised, as reflected in the parties' respective Nonbinding Statements of Issues.

c. Intervenor-Respondents' Briefs. The parties propose that Intervenor-Respondents representing industry ("Industry Intervenor-

Respondents”)⁶ file a single brief and Intervenor-Respondents representing environmental groups (“Environmental Intervenor-Respondents”)⁷ file a single brief. The interests of Industry Intervenor-Respondents and Environmental Intervenor-Respondents are not aligned; each group intends to help EPA defend against claims brought by the other.

Industry Intervenor-Respondents propose to file a brief of 12,000 words. In support of their request to file a separate Intervenor-Respondent brief with a limit of 12,000 words Industry Intervenor-Respondents state as follows: The brief for the 29 Industry Intervenor-Respondents must respond to the issues that have been raised by the Environmental Petitioners in their Statement of Issues filed with the

⁶ Industry Intervenor-Respondents in Case No. 11-1148 (and consolidated cases) are American Chemistry Council, American Forest & Paper Association, American Gas Association, American Home Furnishings Alliance, Inc., American Petroleum Institute, American Wood Council, ARIPPA, Biomass Power Association, Brayton Point Energy, LLC, Brayton Point Holdings, LLC, Cement Kiln Recycling Coalition, Coalition for Responsible Waste Incineration, Council of Industrial Boiler Owners, Edison Electric Institute, Hardwood Plywood and Veneer Association, JELD-WEN, Inc., Lafarge Building Materials, Inc., Lafarge Midwest Inc., Lafarge North America, Inc., National Association of Manufacturers, National Rural Electric Cooperative Association, Portland Cement Association, Rubber Manufacturers Association, Steel Manufacturers Association, Treated Wood Council, Utility Solid Waste Activities Group, Waste Management Inc., WM Organic Growth, Inc., and WM Renewable Energy, LLC.

⁷ Environmental Intervenor-Respondents in Case No. 11-1148 (and consolidated cases) are Clean Air Council, Desert Citizens Against Pollution, Downwinders At Risk, Environmental Integrity Project, Huron Environmental Activist League, Louisiana Environmental Action Network, Montanans Against Toxic Burning, Partnership for Policy Integrity, and Sierra Club.

court. The eighteen issues identified by the Environmental Petitioners include challenges to the status of specific fuels and ingredients, including whole tires, used oil, coal refuse, resinated wood, pulp and paper sludge, construction and demolition wood, coal combustion residuals, coal tar, refinery gas, synthetic fuel, heavy recycle, asphalts, blast furnace gas, coke oven gas, sawmill materials, bagasse, and crop residues. Industry Intervenor-Respondents produce, process, sell, combust, or use these materials and anticipate that a defense of each of the fuels and ingredients identified above, including a discussion of how the fuel is produced and managed, will require at least 600 words, for a total of 10,200 words. Environmental Petitioners also identify combustion generally, combustion by the generator of the secondary material, and the process for granting petitions for non-waste determinations as additional provisions of the NHSM Rule that they intend to challenge. Industry Intervenor-Respondents anticipate that the defense of each of these three general provisions will require at least 600 words, totaling 1,800 words. Therefore, Intervenor-Respondents are seeking a brief of 12,000 words to provide a vigorous and helpful supplement to EPA's defense of its rule.

Because Environmental Petitioners propose to file only a standard length 14,000 word opening brief, they oppose as unnecessary Industry Intervenor-Respondents' request for an over-long 12,000 word response brief. Environmental Petitioners respectfully submit that Industry Intervenor-Respondents can respond

to a standard length opening brief with a standard length intervenor brief, as contemplated by Rule 28.1(c) of the Federal Rules of Appellate Procedure and Circuit Rules 29(c) and 32(a)(2)(B). Further, if Industry Intervenor-Respondents are allowed a 12,000 word brief, Environmental Petitioners will be prejudiced by having to respond to EPA's 28,000 word brief and an Industry-Intervenor Respondents' over-long 12,000 word brief with a standard-length reply brief of just 7,000 words. Accordingly, Environmental Petitioners oppose Industry Intervenor-Respondents' request for a 12,000 word brief.

Environmental Intervenor-Respondents request a standard-length brief of 8,750 words. Environmental Intervenor-Respondents respectfully submit that a standard-length intervenor-respondent brief is necessary to respond to Industry Petitioners' standard-length opening brief, which as explained above by Industry Petitioners may address a wide range of industry-specific and site-specific issues.

d. Reply Briefs. Industry Petitioners propose to submit a reply brief with the standard allotment of 7,000 words. In support of their request, Industry Petitioners state as follows: The NHSM Rule will impact a wide variety of facilities and result in industry-specific and site-specific impacts. As noted above, the rules raise, and Industry Petitioners expect to brief, numerous issues that are not common among all Industry Petitioners. With a 7,000 word limit,

Industry Petitioners will be able to respond to each of the relevant issues, and the Court will have the benefit of complete argument in the case.

Environmental Petitioners request a standard-length reply brief of 7,000 words, unless the Court grants Industry Intervenor-Respondents' request for an over-long 12,000 word brief. If the Court denies that request, Environmental Petitioners submit that 7,000 words will be necessary to address responsive arguments raised in EPA's responsive brief of 28,000 words and in Industry Intervenor-Respondents' responsive brief. If the Court grants Industry Intervenor-Respondents' request for a 12,000 word brief, however, Environmental Petitioners respectfully request a reply brief of 10,250 words. Environmental Petitioners respectfully submit that they will need 10,250 words to address the responsive arguments raised in the responsive briefs totaling 40,000 words that would be filed by EPA and Industry Intervenor-Respondents, if Industry Intervenor-Respondents' request for an over-length brief is granted.

2. Schedule. The parties propose the following schedule:

- Industry Petitioner and Environmental Petitioners' opening briefs will be due February 12, 2014.
- EPA's response brief will be due May 20, 2014.
- Intervenor-Respondent's briefs will be due June 19, 2014.
- Industry Petitioner and Environmental Petitioners' reply briefs will be due July 3, 2014.

- The Joint Appendix will be due July 17, 2014.
- The final form briefs will be due July 31, 2014.

In addition, all parties request that the Court schedule oral argument in these consolidated cases as early as possible after the conclusion of briefing.

The parties are filing corresponding motions to set briefing schedules and formats in three other related cases: Case Nos. 11-1108, 11-1125, and 11-1141 (and cases consolidated with the foregoing cases). The parties believe it is appropriate to coordinate the briefing schedules of these cases as shown in the table below:

Case No.	Opening Brief	Respondent	Intervenor-Respondent	Reply	Deferred Appendix	Final Briefs
11-1108	1/13/14	4/14/14	5/16/14	5/30/14	6/13/14	6/27/14
11-1141	1/27/14	4/30/14	5/30/14	6/13/14	6/27/14	7/11/14
11-1148	2/12/14	5/20/14	6/19/14	7/03/14	7/17/14	7/31/14
11-1125	2/19/14	6/3/14	7/3/14	7/17/14	7/24/14	7/31/14

Given the need for and complexity of coordination among such a large number of parties, the parties agree that it is important for all parties to use their best efforts to maintain the briefing schedule without requests for extensions.

WHEREFORE, the Parties respectfully request that the Court enter an order ordering the following schedule for briefing the above-captioned case. The alternative proposals on words limits also are set forth below.

<u>FILING</u>	<u>DUE DATE</u>
Petitioners' Opening Briefs	February 12, 2014
Respondent's Brief	May 20, 2014
Intervenor-Respondents' Briefs	June 19, 2014
Petitioners' Reply Briefs	July 3, 2014
Deferred Joint Appendix	July 17, 2014
Final Form Briefs	July 31, 2014

<u>BRIEFS</u>	<u>INDUSTRY PETITIONER WORD LIMIT PROPOSAL</u>	<u>ENVIRONMENTAL PETITIONER WORD LIMIT PROPOSAL</u>
Petitioners' Opening Briefs	14,000 words	14, 000 words
Respondent's Brief	28,000 words	28,000 words
Industry Intervenor-Respondents' Brief	12,000 words	8,750 words
Environmental Intervenor-Respondents' Brief	No position	8,750 words
Industry Petitioners' Reply Brief	7,000 words	7,000 words
Environmental Petitioners' Reply Brief	No position	7,000 words if Industry Intervenor-Respondent Brief is 8,750 words; 10,250 words if Industry Intervenor-Respondents are granted a 12,000 word brief

Dated: November 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2013, I caused a copy of the foregoing document to be served by the Court's CM/ECF system on all counsel of record in this matter.

/s/ Susan Parker Bodine
Susan Parker Bodine