February 23, 2006

EPA Docket Center (6102T)
Docket ID No. OAR-2002-0051
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket ID No. OAR-2002-0051

Dear Sir or Madam:


EPA has requested comment on whether “to ban the use of fly ash from a utility boiler that is controlling mercury as an additive to cement kiln feed.” Id. at 72334. We believe that such a ban on the use of fly ash as a cement plant raw material would be an extreme action that is wholly unjustified and should not be adopted. According the most recent data compiled by ACAA, between 2 – 3 million tons of fly ash are used in this manner annually. See ACAA, 2004 Coal Combustion Product (CCP) Production and Use Survey, available at http://www.acaa-usa.org/PDF/2004_CCP_Survey(9-9-05).pdf. In addition, a blanket prohibition

\(^1\) USWAG was formed in 1978, and is an association of approximately 80 energy industry operating companies and associations, including the Edison Electric Institute (“EEI”), the National Rural Electric Cooperative Association (“NRECA”), and the American Public Power Association (“APPA”). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly owned electric utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation’s consumers of electricity.

\(^2\) The American Coal Ash Association consists of U.S. and non-U.S. producers of coal combustion products (CCPs), non-utility producers, marketers, organizations, and individuals with commercial, academic, research, and other interests in the management of CCPs. ACAA’s mission is to advance the management and use of coal combustion products (CCPs) - including fly ash - in ways that are environmentally responsible, technically sound and commercially competitive. ACAA and its members do this through public and private sector partnerships, technical assistance, education, publications, meetings and workshops.
would be inconsistent with section 6002 of the Resource Conservation and Recovery Act (RCRA) and Executive Order No. 13101, which direct procuring agencies to purchase items designated in Comprehensive Procurement Guidelines that are composed of the highest percentage of recovered materials practicable. RCRA § 6002(c), 42 U.S.C. § 6962(c); Exec. Order No. 13101, 63 Fed. Reg. 49643 (Sept. 16, 1998). In accordance with these directives, EPA issued a guideline designating cement and concrete containing, among other things, coal fly ash as a product for which procuring agencies must establish an affirmative procurement program that establishes a preference for procuring the designated item. See 40 C.F.R. §§ 247.6, 247.12(c)(1). It would be highly inappropriate for EPA to prohibit the use of fly ash as an additive to cement production while procuring agencies are obligated to purchase such fly ash under the Comprehensive Procurement Guideline program. 40 C.F.R. Part 247.

At issue is whether the mercury contained in fly ash generated from utility boilers that employ mercury capture technology will be released to the atmosphere when the fly ash is used as a raw material in cement manufacturing. First, the requirements under the Clean Air Mercury Rule (“CAMR”), 70 Fed. Reg. 28606 (May 18, 2005), which would require utility boilers to control mercury are the subject of ongoing litigation and are currently being reconsidered by the Agency. 70 Fed. Reg. 62213 (Oct. 28, 2005). Consequently, the specific boiler mercury emission reduction obligations may change.

Second, apart from the future resolution of the CAMR, the options for implementing mercury controls are far from settled. Reliable, cost-effective control technologies designed specifically for capturing mercury have not yet been fully developed or tested. The U.S. Department of Energy (“DOE”), EPA, the University of North Dakota Energy & Environmental Research Center (“EERC”), and the Electric Power Research Institute (“EPRI”) have all conducted extensive research and development programs over the past decade with the aim of developing cost-effective methods for reducing power plant mercury emissions. Full-scale demonstrations of mercury control technologies at individual power plants are just getting underway. It will take at least 2 to 3 years to complete these initial demonstrations and evaluate the potential effectiveness of possible new control technologies. And then, several more years will be needed before these technologies can be considered “commercially available.” Some of these control technologies would be employed at a point beyond the primary capture of particulate matter (in this case fly ash), thereby alleviating any potential for concern with fly ash potentially containing elevated levels of mercury. Taking steps now to prohibit the use of fly ash in cement manufacture when future mercury capture may have little or no material impact on characteristics of fly ash would be both unwise and would undermine the Agency’s current policy to promote increased coal ash utilization. See 65 Fed. Reg. 32214, 32217, 32229-30 (May 22, 2000); EPA, Coal Combustion Products Partnership (C2P2), EPA530-F-03-004 (Oct. 2005).

Third, a premature ban on use of coal fly ash in cement manufacture may have unanticipated negative consequences. EPA appears not to have given consideration to what alternatives would replace fly ash. Substituting other materials for fly ash could lead to the use of less environmentally-friendly materials or possibly result in increased greenhouse gas emissions. In addition, EPA appears not to have considered the disposition of the fly ash that would no longer be used for cement manufacture. While other uses may be possible, the development of such alternative uses may require years of market development, and in the meantime, these added
volumes of fly ash would likely be destined for landfill disposal. In short, while EPA would be prematurely solving a problem that may never exist, it might be creating new environmental problems stemming from the alternatives to fly ash or perpetuating large volumes of fly ash land disposal when the industry with EPA’s support has made commitments to achieve significantly increased utilization of coal ash as part of the Agency’s Resource Conservation Challenge.

EPA’s notice sets forth a variety of control techniques the Agency has considered but ultimately rejected as site specific and therefore not a basis for a national regulation. See 70 Fed. Reg. at 72334. Although EPA is correct in its conclusion that a regulation based on these control techniques would be inadvisable, what they all have in common – as would also be the case for a blanket prohibition on the use of fly ash in cement manufacture – is that they propose a solution to a problem that may never occur. A regulatory ban based on little more than speculation about the future characteristics of fly ash would be of questionable legal validity.

In sum, it would be premature for EPA to adopt a ban of the use of fly ash in cement manufacture when the Agency lacks the information to determine whether fly ash generated at boilers controlling mercury will contain elevated levels of mercury. We believe that this issue should be the subject of additional research to determine the likely characteristics of fly ash at such boilers and to assess the consequences of substituting other materials for fly ash.

If you have any questions or desire additional information, please contact me.

Very truly yours,

James R. Roewer  
Executive Director