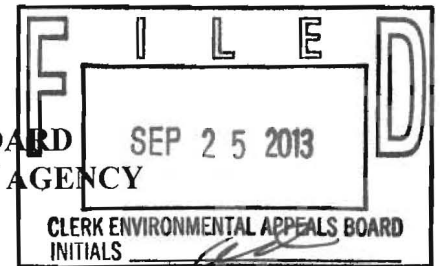


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____))
In re:))
))
ESSROC Cement Corporation,) RCRA Appeal No. 13-03
))
))
RCRA Permit No. IND 005 081 541))
_____))

ORDER GRANTING PETITIONER'S REQUEST
FOR ORAL ARGUMENT AND GRANTING U.S. EPA, REGION 5'S
MOTION FOR LEAVE TO FILE SURREPLY

In its Corrected Petitioner's Reply Brief dated August 26, 2013, petitioner ESSROC Cement Corporation ("ESSROC") requested oral argument in the above-captioned matter. The Environmental Appeals Board ("Board") agrees that oral argument may be of assistance in its deliberations, and **GRANTS** ESSROC's request for oral argument.

The parties are ordered to participate in oral argument beginning at 10:30 a.m. Eastern Time on Thursday, November 7, 2013, in the Administrative Courtroom, U.S. Environmental Protection Agency, William Jefferson Clinton East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. If *amicus curiae* Cement Kiln Recycling Coalition ("CKRC") desires to participate as well, it must notify the Clerk of the Board of its intentions by October 4, 2013. Any party who desires to participate in the oral argument by videoconferencing also must notify the Clerk of the Board by October 4, 2013. The Board has allocated 90 minutes total for this oral argument. At this time, the Board has not determined the allocation of time for the oral

argument; however, in advance of the oral argument, the Board will issue an order allocating the amount of time for each participant's argument and provide further instructions, including those related to participation by video conferencing equipment as needed.

Oral argument participants should be prepared to present full arguments supporting their positions, with a particular focus on the following:

(1) The scope of authority in 40 C.F.R. § 270.10(D)(1)(viii) for the 2012 site specific risk assessment in light of (as applicable) previous positions taken by the Agency and CKRC in previous litigation related to this final rule (e.g., as applicable, the preamble to the final rule, comments on the proposed rule, response to those comments, and briefing and oral argument on April 16, 2007 in *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207 (D.C. Cir. 2007));

(2) The interpretation that should be given to 40 C.F.R. § 270.10(D)(1)(ix) in light of the D.C. Circuit's decision in *Cement Kiln Recycling Coalition v. EPA* that "any information under [this factor] must be 'similar in nature' to that identified in the first eight," 493 F.3d at 221, and "the 'catchall has to be understood within the context of the limitations' enumerated in the first eight factors," *id.* at 221 n.8 (citing Oral Arg. Recording at 1:02:53); and

(3) U.S. Environmental Protection Agency, Region 5's ("Region") reliance on the 1997 Mercury Study Report to Congress and/or the 2005 Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities to establish the annual mercury feed rate limit.

Additionally, by motion dated September 6, 2013, the Region sought leave to file a surreply brief responding to arguments that the Region alleges ESSROC raised for the first time in its Reply and in contravention of 40 C.F.R. § 124.19(c)(2). On September 17, 2013, both ESSROC and Cement Kiln Recycling Coalition opposed the Region's motion, arguing in part

that neither had raised any new issues in their respective briefs warranting a surreply.

Although 40 C.F.R. part 124 does not provide for surreply briefs as a matter of right, the Board has discretion to grant requests to file surreply briefs and typically does so in cases where new arguments are raised in opposing reply briefs or where further briefing would assist the Board in resolving disputed claims. *E.g., In re ArcelorMittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011) (Order Granting in Party EPA's Motion to File Surreply, Denying Petitioner's Request to Provide Additional Information, and Granting Oral Argument); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10 to 12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing). Upon examination of the filings in this case to date and in light of the Board's grant of the oral argument request, in which issues discussed in the Region's proposed surreply are likely to emerge, the Board finds that a surreply may be helpful in its decisionmaking. Accordingly, the Region's motion for leave to file a surreply is **GRANTED** and the proposed surreply is accepted for filing.

So ordered.

Dated: *September 25, 2013*

ENVIRONMENTAL APPEALS BOARD

By: *Leslye M. Fraser*

Leslye M. Fraser
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Scheduling Oral Argument in the matter of *ESSROC Cement Corporation*, RCRA Appeal No. 13-03, were sent to the following persons in the manner indicated:

By U.S. First Class Mail & Facsimile:

Counsel for Petitioner
ESSROC Cement Corporation
Philip J. Schworer
Frost Brown Todd, LLC
7310 Turfway Road, Suite 210
Florence, KY 41042-1374

Counsel for Amicus Curiae
Cement Kiln Recycling Coalition
Richard G. Stoll
Catherine M. Basic
Foley & Lardner LLP
3000 K Street, N.W.
Washington, DC 20007-5109
facsimile: (202) 672-5399

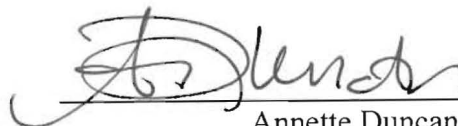
By EPA Pouch Mail & Facsimile:

Sabrina Argentieri
Mark J. Palermo
U.S. EPA, Region 5
77 West Jackson Boulevard (C-14J)
Chicago, IL 60604
facsimile: (312) 385-5527

By Inter-Office Mail & Facsimile:

Laurel Celeste
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W. (MC-2333A)
Washington, DC 20460
facsimile: 202-564-5644

Date: SEP 25 2013



Annette Duncan
Secretary