

April 9, 2002

Marianne L Horinko, Assistant Administrator
Office of Solid Waste and Emergency Response
U. S. Environmental Protection Agency
USEPA Headquarters 5101
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Ms. Horinko:

The Northeast Waste Management Officials' Association (NEWMOA) is writing to raise the issue of Use Constituting Disposal (UCD), which could be considered to be a barrier to recycling because both the product and the hazardous secondary materials (HSM) "feedstock" used to make it are subject to hazardous waste regulation. We would like to see UCD included as a potential issue for EPA to explore more fully in the future. In recommending this course of action, NEWMOA's state waste program directors are mindful that, historically, concern about potential abuses has discouraged relaxation of the UCD principle. However, it appears possible that clear guidance, case-by-case review, and opportunity for public comment could alleviate these concerns in instances where a finding of UCD clearly results in over-regulation and prevents legitimate recycling. NEWMOA's member-state environmental agencies believe that the potential for increased recycling, at little or no increased risk to the environment, may justify an EPA initiative to cause a public re-examination of the regulatory options for allowing greater flexibility.

The issue of UCD arises whenever HSM are used to make, or are contained in, products whose normal use brings them into contact with the land. In virtually every proposal or example that EPA has publicly responded to, EPA has characterized the intended product as an example of UCD. The consequences are:

- the HSM continue to be subject to regulation as hazardous wastes
- the recycler may be subject to permitting for storage prior to recycling
- the recycler's process wastes may become hazardous wastes by the Derived-From Rule and/or subject to LDR-based standards
- the product remains a solid/hazardous waste and must comply with LDR-based standards to avoid further regulation, and
- if the product remains a hazardous waste, even lawful use may lead to future problems with property transactions (e.g., deed restrictions and difficulties obtaining mortgage loans).

The legitimate use of HSM to make products involves none of the foregoing consequences if the normal use of the product does not bring it into contact with the land (i.e., not UCD). Authorized states that administer the hazardous waste regulatory program on behalf of EPA can be no less stringent than EPA in applying the definition of UCD. Therefore, the present concept of UCD is

a strong barrier to recycling. Conversely, where UCD does not apply, the exclusions that are possible when HSM are used to make products are an equally strong incentive to recycle.

The distinction between the two situations is based upon the presumption that "use" in contact with the land inherently "constitutes" an element of "disposal." NEWMOA believes that this view can sometimes be invalid. Contact with the land can be "integral" to use, wherein the product is actually applied to, or intimately mixed with, soil (e.g., fertilizers, soil conditioners and dust suppressants). Contact with the land can also be "incidental" to use, wherein the product merely rests on the ground (e.g., pavement), uses the ground for structural support (e.g., foundation building materials, signs, utility poles), or protects underground objects/surfaces (e.g., paints and sealers). The presumption that "use" constitutes "disposal" has greater validity when contact with the land is "integral" to use. The physical-chemical structure of the product is more likely to facilitate migration of constituents and ease of migration is often essential to effectiveness. The presumption may have little or no validity when contact with the land is "incidental" to use. These products tend to be, or to form, solid objects. The physical-chemical structure is more likely to resist migration of constituents and effectiveness does not depend on migration.

An existing EPA/State UCD Workgroup has been examining the UCD issue and has developed a basic strategy proposal for regulatory reform. When contact with the land is only "incidental" to the use of an HSM-derived product, there should be an opportunity, at least on a case-by-case basis, to determine that "use" does not constitute "disposal" and to exclude both the HSM and the product from the definition of solid waste.

NEWMOA understands that EPA staff will be meeting with state officials at the upcoming ASTSWMO mid-year meeting to discuss, among other things, potential activities EPA may undertake in response to the recent court decision regarding the *Association of Battery Recyclers vs EPA*. NEWMOA believes the UCD issue should be included in those discussions. Should UCD emerge as a priority following those discussions, NEWMOA believes a rulemaking to address UCD should be based upon case-by-case exclusions by the administering agency, with safeguards such as, but not limited to:

- ineligibility if contact with the land is integral to the use of the product (i.e., the product is either applied to the land or mixed with the soil), such as in the case of fertilizers, soil conditioners, and dust suppressants,
- agency approval must include an affirmative determination that the recycling is legitimate
- the agency must issue an approval document, which must include the conditions that the generator(s) and recycler(s) must comply with to maintain the exclusions
- public notice, allowing at least 30 days for public comment to the agency, before issuing an approval document
- the administering agency could issue approvals only to generators and recyclers within its jurisdiction.

NEWMOA has been advised that, if EPA will not commit to a regulatory reform initiative in this area, the New York State DEC is prepared to submit a pilot project to implement such a strategy

under the EPA/State Regulatory Innovation Agreement, negotiated by ECOS. While NEWMOA would strongly support New York's project, member states would prefer that the regulatory reform be broadly applicable, not project-specific and limited to New York State.

NEWMOA is a nonprofit, nonpartisan association whose membership is composed of the hazardous waste, solid waste, site remediation and pollution prevention directors from the environmental agencies of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont. NEWMOA was established by the Governors of the New England states as an official regional organization to coordinate hazardous waste, solid waste, waste site cleanup and pollution prevention activities and was formally approved by the USEPA in 1986. One of NEWMOA's priorities is facilitating communication among its member states and between states and federal agencies concerning regulatory and policy issues involving solid and hazardous waste.

In closing, NEWMOA appreciates your consideration of this recommendation and looks forward to working with EPA and the states on this issue. Please feel free to contact me at 617-367-8558, ext. 301 if I can be of assistance.

Sincerely,

William F. Cass
Executive Director

Cc: Thomas Kennedy, ASTSWMO
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