

## Summary of the December 9, 2008 NEWMOA/States Conference Call

### Regulation of Off-Specification Chemicals (“OSCs”)

All the NEWMOA States participated in this conference call. The issue at hand was States’ policies on regulation of recycled secondary materials that would be solid wastes under RCRA and therefore potential hazardous waste or alternatively are unregulated commercial products.

CTDEP lead off the discussion. CT has no policy on determinations of commodity vs. waste. CT looks at this issue on a case-by-case basis. Anyone claiming commodity status for a secondary material has to comply with 40 CFR 261.2(f).

MassDEP --- has no written policy/guidance on making commodity vs. waste determinations; use the 1989 Sylvia Lorraine memo as a tool on a case-by-case basis. Have allowed water-contaminated jet fuel generated at airports to be reused on-site in other types of fuel burning equipment that can burn that fuel without hazardous waste regulation. Have allowed similar reuse of off-spec’ fuels onsite without processing except for water separation. OSCs to be reclaimed can qualify for a recycling permit for both onsite reclamation and for OSC sent to an off-site reclamation facility; with the permit generator can ship OSC on a BOL.

MEDEP – OSCs if hazardous generally are hazardous waste; company can apply for an exemption to use as a product; otherwise if contaminated, have to handle as a hazardous waste. If OSC is unused and meets specifications (not expired), it is not a waste. If OSC is not in its original container, not expired and still useful, it is not a waste. If OSC is transferred off-site for use/reuse, the two parties exchange letters with MEDEP to legitimize the activity.

NHDES --- when OSCs are to be used at an off-site facility, NH uses the Lorraine memo as guidance in making commodity vs. waste determinations. NH has put guidance in writing that considers three criteria to use in making case-by-case judgements in this issue:

- Does the OSC meet commercial specifications similar to the corresponding virgin material ? does it have the same strength ?
- Is the OSC as effective as the corresponding virgin material ?
- Is the OSC used under controlled conditions like the corresponding virgin material would be?

NH doesn’t consider the economics of the operation in making commodity vs. waste determinations.

NJDEP --- follow EPA regulations. Reuse of OSCs on-site without processing/treatment is not regulated. If OSC is sent off-site, it may be covered by the NJ beneficial reuse

program and NJ would look at each situation on a case-by-case basis to make the commodity vs. waste determination.

NYDEC --- use the Lorrance memo to make commodity vs. waste determinations. Consider whether storage of the OSC is proper and whether OSC is used in excessive amounts. Consider that unused OSCs may be used for other legitimate purposes than the original one for which it was produced. Used OSCs maybe reused in a legitimate manner similar to the first use under EPA's continued use policy. In making use/reuse exclusions, look at UCD (use constituting disposal) and TAR (toxics along for the ride) issues. Example of allowed continued use as a commodity: kerosene used to calibrate fuel injectors by an automotive company sent off-site as a commercial fuel to be burned for energy recovery.

RIDEM --- RI regulations don't address OSCs. RI handles commodity vs. waste determinations on a case-by-case basis. Long-term storage of OSC without use makes it a waste. Issues with WalMart --- dented but non-leaking packages, can handle as a product; returned product if legitimate reuse is documented can be considered a product.

VTDEC --- VT also makes commodity vs waste determinations on a case-by-case basis but the issue has seldom come up. If an OSC is similar enough to the corresponding virgin product and as effective, it may not be considered a waste. Example of commodity vs. waste determination: ultrapure solvent (petroleum naphtha) used by a semiconductor manufacturer to clean printed circuit boards sent off-site to be reused as general parts washer determined to be a commodity.

In summary, there seems, in my view, to be differences among the States between making determinations of commodity vs. waste using agency guidance, written or unwritten, and allowing reuse of OSCs under the federal use/reuse exclusion at 40 CFR 261.2(e)(1) and State equivalents.