

**Notes for the April 12, 2011 NEWMOA Conference Call on
“Hazardous Secondary Materials”**

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Notes drafted by: Sean Carney, RIDEM with edits by Jennifer Griffith, NEWMOA

Jennifer began the call by stating that a webinar is scheduled for 4/15 to finalize the agenda/program for the upcoming Inspector Training workshop. The workshops are scheduled for Region II on 5/24 in Edison, NJ and for Region I on 6/23 in Sturbridge, MA. A question was raised regarding the fee for attending the training session and Jennifer replied that the regular fee of \$40 would be required unless a financial hardship exists. In such a case she recommended that the individual states contact her to discuss the matter. Jennifer also explained that NEWMOA has set up the “members only” secure area on its website on which the notes from previous calls will be posted for members to review.

The discussion moved on to the topic for the teleconference which was the regulation of hazardous secondary materials. NJ proposed the topic and indicated that they were “basically interested in understanding where our brethren states are with regard to potentially considering the rule and to advise on what’s been happening here (NJ) in regards to HSM”.

Tracey (EPA HQ) explained the general provisions of the 2008 DSW rule amendment concerning the HSM exclusion from the definition of solid waste. She added that the Sierra Club and another environmental organization had filed lawsuits against the EPA relating to the rule making on HSM. Tracey stated that EPA entered into a settlement agreement with the plaintiffs which required EPA to take the rule back for revisions. Presently, EPA plans to release the new proposal for public comments on 6/30/11 and then issue the Final Rule by 12/31/12. Participants asked EPA to describe the proposed changes to the 2008 DSW Rule but they could not comment on specific sections because the EPA workgroup was still deliberating on the matter. Tracey urged NEWMOA and individual states to develop comments on the new proposal.

Jennifer then handed the discussion over to Mike Hastry (NJ) to initiate the discussion on the main topic of the call. NJ & PA have adopted the new DSW rule and so far there have not been any major problems as a result. Inspections of most of the Notifiers found no violations, although some smaller companies had problems because they did not really know what they were notifying for. In some cases the company filled out the notification form indicating that they were handling HSM because they were not aware of the requirements of the new rule. Solvent recyclers in NJ, such as Vieola and SafteyKleen were aggressively pursuing new business under the DSW framework and may reach out to companies in nearby states for new business. The cost saving for the TSDs does not appear to be significant, but the new rule is a potential marketing tool to increase their customer base by adding a lot of smaller customers.

NJ asked whether or not other NEWMOA states intended to pick up the DSW rule because it may result in increased flow of HSM (formerly hazardous waste) from these states to NJ facilities. Under the rule, DSW HSM shipments can only occur between states that have each adopted the rule. The concern that new facilities would “pop up” to become recyclers has not happened in NJ where the TSDs were handling 99 percent of the recycling of the HSM. The concern of dangers posed by poorly equipped sites handling HSM has not materialized. NJ was

frequently sampling HSM and has found no evidence of toxins “along for the ride” in the material to be recycled. The solvents were already regulated as HW and that the rule change just relieved/removed some of the regulatory requirements like container management, manifesting etc. EPA added that the financial assurance requirement of the DSW Rule would prevent (dissuade) many less sophisticated companies from trying to become HSM recyclers.

Another of the concerns raised about the 2008 DSW Rule was that the EJ analysis was inadequate, but the EJ analysis for the new proposed rule was very robust. EPA indicated that the new EJ analysis of the DSW Rule was extensive and went through a peer review. This analysis was very specific to the DSW Rule and while it may serve as a good framework, it is unlikely that it would be the new standard for analysis.

Jennifer then asked the remaining NEWMOA states to respond to the questions posed by NJ.

NY

Bill Yeman read a prepared statement (a copy is included at the end of these notes) which covered the following general points.

- NY has not picked up the 2008 DSW Rule
- Concerns about the transfer based segment of the 2008 Rule and also over lack of container management standards that apply to HW containers
- is waiting to see the revisions and will consider picking up sections of DSW rule depending on what is finally published in Federal Register
- most common issue with HSM involves on-site solvent recycling units that are not “close loop”
- also concerned about “toxins along for the ride” and the more lenient legitimacy criteria for HSM – in NY it is a requirement, whereas in DSW it is only a consideration

Discussion of Shipments

In the discussion about HSM shipments, EPA clarified the requirements for the interstate transportation of HSM: both the generator state and the receiving state must have adopted the 2008 DSW rule in order for a shipment of hazardous waste (eg, solvent) to be managed and transported as a HSM. No DSW recycling facility can accept manifested waste unless it is also a TSD. Could a NH generator ship spent solvent as a HSM to NJ if NH has not adopted the 2008 DSW rule? No. For example, spent solvent would have to be managed as a HW if the generator’s state has not adopted the DSW rule. Would the generator be required to ship the HW via a manifest and the NJ receiving facility be required to complete the TSD section of the manifest? Yes. A manifest must accompany the shipment and be completed by the TSD that is authorized to receive it

Participants asked how the shipment is handled if the HSM is sent from PA to Iowa and crosses through states that have not adopted 2008 DSW rule. EPA replied that the generator must check with all of the interim states to determine what their state regulations require. (Please see attached PP slides provided afterward by Amanda Geldard, EPA HQ).

RI

Sean Carney stated that RI has not adopted the 2008 DSW Rule and does not intend to pick it up in the foreseeable future. RI commented on 2003 & 2008 DSW rule proposals. RI may consider the adopting the DSW rule depending on how the new version is structured and the nature of the new provisions. Jennifer asked if RI had received feedback from its TSDs or HW generators regarding the DSW Rule and Yan Li (RI) replied that RIDEM has not received inquiries from its permitted facilities.

VT

Lynn Metcalf stated that VT has no immediate plans to pick up the 2008 DSW Rule but is waiting to see what changes will come in the proposed rule. She stated that VT commented on the 2008 DSW Rule proposal and has not received feedback from facilities about adopting the rule.

CT

Ross Bunnell stated that no individual facility has contacted CTDEP to request the adoption of the DSW rule. CT commented on the 2003 FR notice (on DSW) and on the 2009 NEWMOA effort to comment on the 2008 rule. CT has concerns over the legitimacy criteria and the general lack of controls to prevent “over” accumulation on HSM onsite without notice to State. CT is currently working on rule making to pick up new rules through July 2008, so it will be a long time before CT gets to the DSW rule.

CT asked NJ if they have encountered/discovered any generators outside of NJ sending their HW to a NJ facility under the new DSW rule as HSM. NJ responded that the DEP has not encountered an instance in which a NJ receiving facility had accepted HW from an out of state generator as HSM. The problem they encountered with newly registered HSM sites was limited to SQGs that did not understand the new rule and filled out the Notification form incorrectly. EPA asked NJ if the problematic SQGs were facilities that accidentally filled out HSM section of the Notification form or SQGs that intended to manage their spent solvent as HSM and failed to comply with the requirements of rule. It was mostly folks that did not intend to check the box on the notification form.

Further Discussion of NJ

Participants asked NJ about the resources required to oversee the rule. NJ has had 15-20 generators notify and they have inspected all but 2, or may have gotten to all of them by now. This number is not a burden for NJ. The TSDs have established files to track each of the individual HSM generators and so NJ DEP can use the TSD records to confirm the generators HSM activities. NJ has communicated with PA regarding management of trans-boundary shipments of HSM.

EPA noted that they required the HSM sites to complete the Notification form so that they could be tracked in RCRA Info. Nationally, there are 44 HSM generators and 4 HSM processors registered in US. Are facilities other than TSDs in NJ thinking about operating as HSM recyclers only and therefore, not obtain full TSD permits? NJ felt that the Financial Assurance requirements for HSM processors would limit the number of companies that apply to be HSM processors. He added that NJ also has HW recycling regulations that control such operations and

that these sites are inspected on a monthly basis. The inspections conducted by NJ of the HSM sites are a full CEI and they count toward their PPA obligations.

NH

Bob Bishop stated that NH is similar to other states in that NH has not adopted 2008 DSW rule and does not plan to at this time. NH will re-evaluate their position once the 2011/12 re-write is published in the FR. NH has concerns over ability to track shipments of HSM and notification issues. The universal waste program is difficult to enforce and does not want to see HW go that way under the new DSW rule.

Further Discussion

Participants were surprised that only 15 HSM notifications were received by NJ and asked if the reason was related to the nature of the industry. Many of the TSD facilities in NJ do not have the (tank) storage capacity to manage the incoming volumes of HW and potential volumes of HSM separately. NJ TSDs came forward and stated that they needed to place the incoming HSM into tanks designated for HW and were concerned that the blending of HSM & HW would nullify the exclusion for the generators of the HSM. NJ brought the issue to EPA and was told that the mixing of HSM with HW at the processing facility does not adversely impact the HSM generators status.

Is there was any relation between the size or types of materials that the notifiers (HSM generators) are sending to the TSDs? Until recently the perception in NJ was that the TSDs could not receive HSM from SQG/CESQG due to the blending issue with HW, but with the clarification from EPA there could be an increase in activity. EPA indicated that nationwide, the activity is mainly with LQGs and mainly with solvents (and some electroplating wastes) and there is a 50/50 split in where the spent solvents are processed as HSM – half on-site and half off-site. There are 29 NAICS codes involved as notifiers for the management of HSM.

Do TSDs track the shipments of HSM to prove that recycling is viable and occurring? NJ replied that the TSD test incoming shipments to ensure that the HSM may be reclaimed under the program and if not they manage as HW. What happens if the TSD determines that the HSM cannot be recycled or processed and must be shipped back to the generator? If the load is rejected the generator may send it to another reclaimer for recycling. EPA stated that if the waste goes back to the generator the TSD must contact their state for guidance regarding the completion of a HW manifest for the shipment. The manifest rule was recently revised to address this contingency and it is permissible for the TSD to return a shipment of HSM to a generator as outlined above.

The next call is Tuesday May 17th at 10:30 and the topic is Consultant Competency – Vermont is the lead state for the topic and is also in the rotation to take the notes.

Prepared notes from NYS DEC:

4/12/11 remarks by NYS:

New York State has not yet picked up the DSW Rule on HSMs that EPA promulgated in the October 30, 2008 Fed Reg. DEC management here initially objected to the so-called “transfer-based” segment of the rule, and when, under the new White House administration, EPA later notified in the May 27, 2009 Federal Register that it was going to revisit the DSW Rule, there appeared to be good reason for us to not pick up *any* part of the rule until the dust had fully settled at EPA on what they wanted the DSW Rule to allow. (We didn’t want to try to hit a moving target, and if we were to put into regulation something that was later less stringent than EPA, we’d have to change it again anyway. EPA’s recent March 21, 2011 Federal Register - - which by the way was on the topic of NON-hazardous secondary materials but which touched upon the status of HSMs - - provided on p 15545 a status report, which said:

We would note that on October 30, 2008, EPA issued a final rule excluding certain hazardous secondary materials from the definition of solid waste issued under the hazardous waste provisions found in RCRA subtitle C (73 FR 64688). EPA is currently re-examining these exclusions, and as part of a settlement agreement with Sierra Club, EPA will issue a proposed rule by June 2011.

EPA goes on to say in this FR that

“This proposal will address, at minimum, issues raised in an administrative petition filed by the Sierra Club, including the four issues discussed in a public meeting...The four issues are (1) the definition of “contained,” (2) notification before operating under the exclusion (3) the definition of “legitimacy” and (4) the transfer-based exclusion.

Reading between the lines, it appears from these four issues that EPA’s upcoming June 2011 proposal might be more acceptable to DEC management - - we’ve had some major management reorganization here anyway - - so, bottom line, I think there’s a chance that DEC in July will actively begin picking up portions of EPA’s *October 2008* DSW Rule, but modified to incorporate EPA’s upcoming June 2011 proposed changes.

DEC understands that EPA is constrained by the several court decisions (ABR etc), and also understands and appreciates the difficulty EPA has in amending the DSW Rule while still staying within the constraints of those court decisions.

Regarding “state by state examples of regulating HSMs”: Far and way the most frequently encountered situation is on-site recycling of spent solvents in systems that do not qualify for the closed-loop exclusion (usually because container storage is involved, as opposed to tank storage). However we did have a few other types, for example: One company generated a spent ferric chloride solution and wanted to send it to an out-of-state wastewater treatment facility for use as a flocculant: The company wanted to be able to use the existing DSW Rule’s more flexible Legitimacy Criteria so that the high levels of TARs (toxics along for the ride) present in the spent ferric chloride - - thousands of ppm Ni and Cr - - could be downplayed and marginalized. The company even appealed to the Governor’s office, but so far we have prevailed in asserting that they failed the legitimacy criteria because TARs were too high.

Regarding the other part of that topic that Jennifer described, i.e., “policies concerning shipments to states that have adopted the EPA DWM rule”: There haven’t been any instances here that I know of where the issue has come up, but I believe here in New York we would allow the HSM to go to an out-of-state facility that was authorized in *that* state to manage this material: It would of course need to be manifested while in New York, and otherwise managed as a haz waste while in NYS. Such a situation would be somewhat analogous to *PCB* wastes being shipped out of NYS: Most *PCB* wastes here in NYS are hazardous wastes if they are at or above 50 ppm, yet we allow them to be shipped to a TSCA-authorized out-of-state facility even if that facility is not also authorized to manage “hazardous waste. {{{UPDATE: TRACY ATAGI OF EPA-HQ CORRECTED THIS PARAGRAPH BY CLARIFYING THAT, UNLIKE THE SITUATION WITH “MATERIAL SPECIFIC” WASTES [such as the above-mentioned *PCB* wastes?], EXCLUDED HSMs ARE EXCLUDED *BECAUSE THEY ARE NOT DISCARDED*, HENCE, IF THEY APPEAR ON A MANIFEST, THEN THIS SHOWS THAT THEY ARE ACTUALLY DISCARDED, AND ACCORDINGLY COULD *NOT* BE EXCLUDED. AS A RESULT, BOTH THE ‘RECEIVING’ AND ‘SENDING’ STATES MUST HAVE THE DSW RULE IN EFFECT IN ORDER FOR A SHIPMENT TO BE EXCLUDED IN EITHER STATE, AND SO - - AND CONTRARY TO THE THIS PARAGRAPH OF NYSs REMARKS - - A HSM GENERATOR IN NYS SHIPPING HIS HSM OUT-OF-STATE COULD NOT SHIP IT TO A RECYCLING FACILITY THAT WAS MERELY AUTHORIZED UNDER THE DSW RULE, IE, NOT A TSD.}}}