

**Notes for the March 8, 2011 NEWMOA Conference Call on
“Identification and Management of Unknowns”**

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Notes drafted by: William Yeman, NYS DEC with edits by Jennifer Griffith, NEWMOA

NH

New Hampshire proposed the topic of this call and indicated it would like to know what is done in other states for two general scenarios involving unknown wastes:

(1) Newly discovered wastes in a controlled setting (eg, wastes discovered in a cabinet that the generator was unaware of). NH indicated they would require the container to be managed as hazardous waste pending the outcome of the hazardous waste determination, but would allow the container to be dated with the date of discovery.

(2) Midnight dumps and waste left at the gate of a transfer facility. NH indicated that for the transfer facility scenario, they advise the TF to keep the waste segregated, label it as haz waste, and call a contractor for characterizing. The Spill Response Team does help municipalities if needed, including attempting to find the responsible party. NH does some of its own sampling, noting that, in addition to checking pH, water content, etc, there are new equipment devices available for characterizing unknowns in the field.

MA

Massachusetts indicated that, for #1, they followed a similar procedure to NH but adding that they would send a notice of non-compliance for failure to make a haz waste determination, and require an accumulation start date of when the waste was *generated*. Mass didn't know of an instance of where a generator was “hammered” for not having managed as hazardous waste a newly discovered waste for the period prior to its discovery, but noted that the individual circumstances and impact would need to be looked at.

For scenario #2, MA indicated that for the transfer station leave-off situation if the amount was small the TF would be expected to be the generator, but that if the amount was larger their Environmental Crimes Unit would be brought in and the ECU would sample the waste and arrange for disposal.

CT

Connecticut indicated that, for #1, they would follow a procedure similar to MA and NH, adding that they would have had a detailed description of wastes and processes so would have an advance idea whether the unknown might be dangerous, and that the date of the site visit could be used if there was nothing to indicate the waste had been generated beforehand. DEP might sample if the unknown was not suspected of being unsafe. CT would issue a Field Office Notice of Violation and, on a case-by-case basis, could require a contractor be used for sampling, and DEP might take a split sample. CT noted that USEPA's guidance 11424 required use of the date of generation, not a later date.

For scenario 2, CT indicated that for the transfer station leave-off situation they were similar to MA but if the waste appeared to be from a household they would leave it up to the transfer station to properly manage the waste. For the midnight dump situation, CT indicated they would

have CT's Emergency Response people respond if the location was state-owned (park, forest). At a transfer station or other property, the transfer station would be the generator, and the hazardous waste investigation team would try to find the responsible party.

VT

Vermont indicated that, for #1, they are similar to NH and would require the waste to be managed as hazardous waste until shown to be non-haz, with 30 days allowed to complete the characterization. VT does not sample themselves, but might observe the sampling depending on the circumstances.

For scenario 2, VT indicated that for both the transfer station leave-off situation, the TS is the generator unless there is evidence of a responsible party and/or it is a large amount, in which case hazardous waste would investigate. Investigators also deal with the midnight dump situation, if the location is remote and/or secure and also low-risk, the material would be left where dumped. In other situations, DEC would utilize their contractor.

NY

New York indicated that, for #1, it followed USEPA's guidance RO#11424 (which was noted to be "Official Policy" in RCRAonLine) but that DEC usually exercised enforcement discretion by not classifying the site as a TSD. A NOV is typically issued for failure to make a haz waste determination, thereby giving 30 days to make the determination. DEC usually does not take its own samples.

For scenario 2, NY indicated that for both the transfer station leave-off situation and the midnight dump situation DEC would investigate the dumping, but commented that identifying the site as the "generator" had both advantages (storage exemptions) and disadvantages (generator fees) and added that the initiator of a manifest ("offeror") was not automatically the generator/creator of the waste.

Additionally NY commented on the ccp scenario raised by CT that it too, like CT, utilized the 261.2(a)(2)(iv)(3) "storage in lieu of disposal" provision to address improper long-term storage of ccps but that, unlike CT, NY was constrained (along with EPA) by its haz waste regulations allowing speculative accumulation of ccps.

NJ

New Jersey indicated that, for #1, it was similar to CT and MA in that the starting date would be the date it was a waste (or the day of the inspection if the generator discovered it then), and further noted that their position would depend on the specific circumstances. DEP has concerns about sampling unknowns and makes the facility do it, but might take a split sample at that time.

For scenario 2, NJ indicated that for the transfer station leave-off situation – which was regarded as environmentally preferable to having it left at roadside etc – it was not uncommon for transfer stations to have an accumulation of "UFOs," and that those accumulations might be discovered only upon a fire or injury. For the midnight dump situation, DEP indicated its approach was similar to that of the other states.

OTHER

There was considerable discussion of “when does an old virgin material become a waste?” States have had disputes with companies on this. CT noted that it could include returned goods (eg, those at Enthone Co), noting that establishing whether the material is a solid waste is an added consideration. CT - - unlike EPA - - does not allow speculative accumulation of ccps and this gives them authority, including setting timeframes. NH remarked that having returned products not inventoried – done for tax purposes – helped them prove that some returned products were wastes rather than non-waste products. Also look at condition of container. The facility needs to prove that the material can be legitimately reworked and reused or else it is a waste. Is there an expiration date, or is it off-spec (might need to sample)? If the facility knows that the material needs to be disposed then it is a waste. MA indicated that it had available an administrative imminent-threat order that could be used for mismanaged ccps scenarios (eg ether) and that it was not appealable (except for the underlying violations afterward), but that it could not immediately be issued by the inspector. NH indicated it had an equivalent.

NEWMOA indicated that the creation of a “members only” area on its website was progressing, and that the monthly call notes would be placed there, but that a request will be forthcoming asking each state for a listing of persons to be authorized users of this members-only area. NEWMOA plans to demonstrate the use of this members-only area via a webinar.

NJ will provide more information on next month’s topic of HSMs. RI is scheduled to take notes.