

Mr. Don McDonald, Jr.
The Centerville Company Contractors
Post Office Box 3631
Greenville, Delaware 19807

Dear Mr. McDonald:

Thank you for your electronic message to the Administrator on November 11, 2002 regarding your concerns over the lack of state compliance with the Environmental Protection Agency's (EPA's) guidelines for the procurement of products containing recovered materials.

Specifically, you report that Delaware, Pennsylvania, Maryland, and New Jersey require the use of straw as vegetative cover, and that this has prohibited you from marketing your product, hydraulic mulch, for use in highway construction projects. You also ask for a copy of the federal law requiring the use of straw mulch.

Let me start by saying that there are no EPA laws or regulations that require straw to be used as vegetative cover in highway construction. In 1992, EPA issued a guide for developing general permits for storm water discharges from construction activities. That document, entitled, "EPA Storm Water Management Plans for Construction Activities," addresses the use of mulches in the seeding of construction areas, but does not limit mulching to the use of straw. I have enclosed a copy of a section of that document that discusses this matter.

EPA does promote the use of hydraulic mulch, as it stabilizes the soil, prevents erosion, protects young seeds from the elements, and creates demand for recovered wood waste and newspaper. For those reasons, in 1995 EPA designated hydraulic mulch in the Comprehensive Procurement Guidelines (CPG) for products containing recovered materials under Section 6002 of the Resource Conservation and Recovery Act (RCRA 6002). [For more information, please see the enclosed EPA factsheet, *2000 Buy-Recycled Series: Landscaping Products*, or visit <http://www.epa.gov/cpg/products/mulch.htm#productinfo>.]

EPA's CPG designations trigger a requirement that "procuring agencies" develop affirmative procurement programs for purchasing designated items containing recovered materials. The term "procuring agency" includes all federal agencies, any state and local government agencies that use appropriated federal funds to purchase the designated items, and contractors to these agencies. The RCRA procurement requirements apply if the procuring

agency is purchasing \$10,000 or more of the designated item or purchased \$10,000 worth of the item or functionally equivalent items in the preceding fiscal year. The RCRA 6002 requirements pertain to both the Federal Highway Administration's (FHWA's) direct procurements and their indirect Federal-aid programs (Federal Highway Trust Fund). Therefore, if states are using FHWA Trust Funds for the procurement of EPA-designated items, they would be procuring agencies subject to the procurement requirements of RCRA 6002.

There are, however, specific circumstances that might preclude the purchase of products made with recovered materials. Procuring agencies would not be required to purchase EPA-designated items if they do not meet the \$10,000 threshold for purchasing the items or the items do not meet the procuring agencies' reasonable performance standards, are not reasonably available, or are only available at an unreasonable price. Except for these limitations, RCRA Section 6002 does not provide for exemptions from the affirmative procurement requirements. Section 502(c) of Executive Order 13101 further requires that, once EPA designates an item, "... agencies shall modify their affirmative procurement programs to require that, to the maximum extent practicable, their purchases of products meet or exceed the EPA guidelines unless written justification is provided...." Presumably, if a procuring agency has not included an EPA designated product in their procurement requirements, some justification should be available for this decision.

The Office of the Federal Environmental Executive oversees agencies' compliance with the procurement requirements of both RCRA 6002 and Executive Order 13101. I have forwarded your message to Ms. Julie Winters of that office. I encourage you to contact her at (202) 564 -1297 to discuss this matter further.

Thank you for your interest in this matter. I share your concerns that we increase the use of recycled products, and that procuring agencies follow EPA's procurement guidelines.

Sincerely yours,

Robert Springer, Director
Office of Solid Waste

Enclosures

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