

PPC 9493.00-1A

HSWA PROHIBITION ON THE USE OF HAZARDOUS WASTE AS A DUST SUPPRESSANT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 31 1986

Mr. Bill Ross
Commissioner
Alaska Department of
Environmental Conservation
Pouch "O"
Juneau, Alaska 99811

Dear Mr. Ross:

Thank you for your correspondence of May 7, 1985. As I understand the matter, you are concerned that the dust suppression regulations Alaska has promulgated may conflict with the Hazardous and Solid Waste Amendments (HSWA) of 1984. I do not think there is a conflict. The HSWA prohibits the use of hazardous waste as a dust suppressant. EPA's regulations in 40 CFR Part 261 define what materials are solid and hazardous wastes. Alaska is free to impose its own regulations on dust suppressants that are not hazardous wastes. With respect to used oil, probably the most common dust suppressant, the HSWA prohibition only applies to those used oils that are themselves hazardous waste or mixed with other hazardous waste identified or listed under the current Part 261 definition.

In response to the four specific questions you asked:

(1) Federal law does not presently set a maximum lead level for used oils, waste oils, or any other dust suppressant. As described above, the HSWA prohibits the use of hazardous waste as a dust suppressant. One way that a solid waste may be identified as a hazardous waste is if it exhibits the characteristic of EP toxicity, defined by §261.24 (and Appendix II of Part 261). When the extract from a solid waste, obtained through the EP toxicity procedure, contains lead at a concentration greater than 5 ppm, it then is a hazardous waste and therefore is subject to the HSWA prohibition. Used oil, because of its often viscous nature, does not always exhibit EP toxicity even if relatively high concentrations of lead are present.

(2) If a question arises as to whether a person is violating the HSWA prohibition, analyzing the extract from a sample of the road oil using the EP toxicity procedure would be necessary to determine compliance with federal law. However, neither EPA regulations nor the HSWA a State to set up an analysis program for road oilers.

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(3) EPA need not issue any formal rules to enact the HSWA prohibition; it became effective when the President signed the HSWA (November 8, 1984). EPA will, in the very near future, issues rules codifying and explaining certain HSWA requirements, including the dust suppressant ban.

(4) With respect to "guidance and expertise," EPA is planning to regulate used oil management under special standards to be proposed later this year.

Later this year, EPA will also propose to list all used oils as hazardous waste. A final listing determination will not be promulgated until the fall of 1986. If you need more information on the status of the proposals, contact David Sussman (202-382-7927) of my office. EPA Region X can, of course assist you is necessary in interpreting current EPA regulations.

Sincerely,

John H. Skinner
Director
Office of Solid Waste (WH-562)

cc: Lisa Friedman, Associate General Counsel, EPA
Kenneth Feigner, EPA Region X

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Attachment

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

MAR 20 1985

MEMORANDUM

SUBJECT: Interpretation of Section 3004(1), the
Dust Suppression Prohibition

FROM: John H. Skinner, Director
Office of Solid Waste (WH-562)

TO: Kenneth D. Feigner, Chief
Waste Management Branch (M/S 530)
Region X

The following is OSW's position on the dust suppression ban mandated by Section 3004(1) of RCRA, as amended.

(1) Used oil (or any other material) that has been mixed with a listed hazardous waste, including wastes generated by small quantity generators, must not be used as a dust suppressant. However, the mere presence of hazardous constituents (for example, trichloroethylene or toluene) is not sufficient proof that the material has been mixed with hazardous waste. EPA bears the burden of proof to show that mixing has occurred. 1

(2) Used oil that exhibits a characteristic (other than ignitability) must not be used as a dust suppressant. 2 You should know that although OGC feels this is a strong position, it is not a direct reading of Section 3004(1) (which speaks of "mixtures"). In the soon-to-be proposed Federal Register notice codifying parts of the Hazardous and Solid Waste Amendments of 1984, EPA will propose the interpretation that the prohibition applies to all hazardous waste (except those hazardous only due to ignitability), not just mixtures.

1 As a point of information, we have proposed [50 FR 1691-1692, January 11, 1985] that for used oil used as fuel, a total chlorine content exceeding 4000 ppm is presumptive evidence of mixing with hazardous waste.

2 This does not necessarily conflict with Alaska's 300 ppm lead limit. Due to the properties of used oil, a given quantity of used oil may be high in lead, and yet not exhibit EP toxicity.

(3) The prohibition does not apply to mixtures of characteristic hazardous waste and non-hazardous materials where the resultant mixture no longer exhibits a characteristic. This interpretation is based on the following logic:

- Section 3004 applies only to hazardous waste; and
- Paragraphs (c) and (d) of 40 CFR §261.3 provide that a mixture of characteristic waste and other material is hazardous waste only if the resultant mixture exhibits a characteristic.

Finally, you should be aware that OSW is working on a proposal to list used oil a hazardous waste. That rulemaking, following the logic that the prohibition is meant to apply to all hazardous wastes, would also propose to prohibit the use of used oil as a dust suppressant. When the EPA rule is promulgated, any rule by Alaska allowing up to 300 ppm lead in used oil used as road oil would be superseded by the Federal prohibition. However, Alaska could still regulate other "waste oils" besides used oil using a lead limit.

cc: Mark Greenwood, OGC
Regional Hazardous Waste Division
Directors, Regions I-X

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

MAR 1 1985

MEMORANDUM

SUBJECT: Interpretation of Waste Oil Regulations

FROM: Kenneth D. Feigner, Chief
Waste Management Branch (M/S 533)

TO: John H. Skinner, Director
Office of Solid Waste (WH-562)

Currently, the Alaska Department of Environmental Conservation is proposing to amend their regulations to prohibit the use of oil for surface oiling or as a dust suppressant if that oil contains lead in concentrations of 300ppm by weight or greater.

The state has requested EPA comments, particularly regarding whether their proposal is consistent with existing or emerging Federal requirements, including the new statutory provision regarding dust suppressants. A copy of their letter and proposal is attached.

Section 3004 (1), the ban on dust suppression states:

"The use of waste or used oil or other material which is contaminated or mixed with other hazardous waste identified or listed under Section 3001 (other than waste identified solely on ignitability), for dust suppression or road treatment is prohibited."

We are interpreting this to mean that the 40 CFR 261.3 mixture rule does not apply in this case. That is, a waste oil which has been mixed with a characteristic waste is prohibited for use as a dust suppressant regardless of whether or not the resultant mixture exhibits a characteristic. Also, the use of a waste oil as a dust suppressant is prohibited if it exhibits a characteristic but has not been mixed with other hazardous waste. And furthermore, it is prohibited if it contains listed hazardous waste constituents (e.g., chlorinated solvents), unless the owner/operator can demonstrate that the source of the constituents did not come from hazardous waste.

We are requesting OSW's position on the application of this provision and ask for your response as soon as possible given that the comment period on the state's proposal closes March 1.

cc: Michael Petruska (WH565A)
Keith Kelton, ADEC

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Attachment

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
POUCH O, JUNEAU, ALASKA 99811

May 7, 1985

Mr. John H. Skinner, Director
Office of Solid Waste
WH-562, Room M2804
U. S. Environmental Protection Agency
401 M Street, S. W.
Washington, D.C. 20460

Dear Mr. Skinner:

As you know, the new road oiling regulations of the Alaska Department of Environmental Conservation (ADEC) became effective May 2, 1985. These regulations allow waste oil to be used as a dust suppressant if it contains lead concentrations less than 300 ppm. The state does not require the EP toxicity method of testing in the required waste oil analysis.

In your March 20 memorandum to EPA, Region X, you stated several propositions which left us uncertain about how to proceed with the implementation of our regulations. You referenced the 1984 amendments to the Resources Conservation and Recovery Act as the basis for your positions. However, you went to say that this did not mean ADEC's new regulations were inconsistent with the amendments. Hence, I am having trouble interpreting your memorandum.

Since we received your memo on April 24, EPA has given ADEC differing and conflicting verbal positions on the applicability of the 1984 amendments to Alaska's road ciling permit program and the methods of analysis for determining lead content in waste oil. I would like clarification on several issues:

Does federal law prohibit the use of waste oil on roads as a dust suppressant if it contains lead levels equal to or greater than 5 ppm?

If so, is it mandatory that the State use the EP toxicity testing method to determine if a liquid road oil meets the federal 5 ppm lead standard?

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Also, if the 1984 Amendments do indeed prohibit the use of waste of oil with lead concentrations or greater than 5 ppm, does EPA need to promulgate formal rulemaking in order to implement this prohibition?

If waste oil cannot be used on the roads as a dust suppressant and the majority of states allow road oiling, what guidance and expertise will EPA offer the States to manage this new potential hazardous waste management problem?

I would appreciate receiving your response to these questions as soon as possible. I want to resolve these differences quickly so that we can determine if the State or road oilers are potentially liable under federal law for damages resulting from road oiling operations in the State conducted after this date. Please contact me if you would like to discuss this matter further.

Sincerely,

Original Document signed

Bill Ross
Commissioner

BR:PO:mt

cc: Lisa Friedman, Associate General Counsel, EPA,
Kenneth Feigner, EPA, Region X
Ronald Kreizenbeck, EPA, Alaska Operations Office

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Attachment

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

JUL 12 1985

MEMORANDUM

SUBJECT: Prohibition on Use of Hazardous Waste for Dust
Suppression or Road Treatment (Your memo dated 6-25-85)

FROM: John H. Skinner, Director
Office of Solid Waste (WH-562)

TO: Charles E. Findley, Director
Hazardous Waste Division (M/S 529)
Region X

Based on the legislative history to Section 3004(1), and on the structure of the statute and EPA's current regulatory policy, we believe that the ban in Section 3004(1) applies only to materials that are themselves hazardous wastes. The provision will be codified in Part 266, a subpart reserved for hazardous waste uses constituting disposal.

The language for Section 3004(1) does not specify whether the mixture of used oil and hazardous waste must, itself, be a hazardous waste in order for the ban to apply. However, the conference report to the Hazardous and Solid Waste Amendments of 1984 explains that Congress intended for the ban to apply to the use of "dioxin contaminated wastes or any other hazardous waste as a dust suppressant" (H.R. Rep. No. 1133, 98th Cong., 2d Sess. 88 (1984)). [Emphasis added.]

In addition, Congress placed the prohibition on dust suppression in Section 3004 of RCRA, where regulatory jurisdiction is generally limited to hazardous wastes identified or listed under Section 3001. Congress, if so inclined, could have expressly extended the prohibition to used oil spills or other materials that are not hazardous wastes. For example, the prohibition could have been placed in Section 3014(a) of RCRA, which applies to all used oils that are recycled, whether or not the used oils are hazardous waste.

In Section 3001 of RCRA, Congress gave EPA the authority to define in regulations the hazardous wastes subject to regulation under Subtitle C. Section 261.3(a)(2)(iii) provides that if a mixture of a solid waste and a characteristic waste no longer exhibits any of the characteristics, it is not a hazardous waste and is no longer subject to Section 3004. This is not an exemption but rather is part of EPA's definition of hazardous waste. Absent a clear indication in the statutory language or legislative

history that Congress intended to override EPA's current regulatory

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policy relating to the definition of hazardous wastes, we believe that the policy should apply in this case.

Based on the above rationale, our position remains as stated in the June 6 memorandum.

cc: Waste Management Division Directors, Regions I-IX
Mark Greenwood, OGC

Attachment

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

JUN 6 1985

MEMORANDUM

SUBJECT: Prohibition on Use of Hazardous Waste for
Dust Suppression or Road Treatment

FROM: John H. Skinner, Director
Office of Solid Waste (WH-562)

TO: Waste Management Division Directors
Regions I-X

The Hazardous and Solid Waste Amendments of 1984 (HSWA) ban the use of hazardous waste and materials mixed with hazardous waste as a dust suppressant. This memorandum explains how EPA interprets the new provision.

THE HSWA

Section 213(1) of the HSWA amended Section of 3004 of RCRA by adding a new paragraph (1) to read as follows:

"(1) Ban on dust suppression. The use of waste or used oil or other material which is contaminated or mixed with dioxin or any other hazardous waste identified or listed under Section 3001 (other than a waste identified solely on the basis of ignitability) for dust suppression or road treatment is prohibited."

EPA recently amended (in the Codification Rule, signed by the Administrator April 20, to be published in the next two weeks) §266.23, the standards for persons using hazardous waste in a manner constituting disposal, to include verbatim the prohibition. In addition, §261.33 (setting out requirements for discarded commercial chemical products) has been amended to provide that the materials and items listed in §261.33 are hazardous wastes when they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment. In effect, this conforming change provides that the requirements of Section 3004(1) will apply to any §261.33 product that is mixed with waste oil or used oil or other material and used for dust suppression or road treatment.

STATUTORY INTERPRETATIONS

Several questions may arise as you implement this prohibition. EPA interprets Section 3004(1) to impose the following requirements:

- Any material used as a dust suppressant is at least potentially subject to the prohibition. Although "used" or "waste" oil is the most common material used for dust suppression, the Act's language includes the term "...or other material..."
- The prohibition applies when a material is mixed with any listed hazardous waste including a waste listed for ignitability.^{1/} This means a mixture containing hazardous waste from small quantity generators, otherwise exempt under §261.5, is subject to the prohibition nonetheless.^{2/}
- The Agency interprets the prohibition to apply to hazardous waste (whether or not it is part of a mixture). Under this interpretation use oil exhibiting EP toxicity, for example, must not be used as a dust suppressant.^{3/}
- For the prohibition to apply, the material being used for dust suppression must actually be a hazardous waste. For example, a characteristic waste that is blended with petroleum so that the resultant mixture no longer exhibits any of the characteristics would not be subject to the prohibition.

1/ The statutory language makes it clear that the provision exempts from the prohibition any material that is mixed with a waste hazardous solely because it exhibits the ignitability characteristic. Materials mixed with any listed wastes are subject to the ban.

2/ The mere presence of constituents identified in Appendix VIII of Part 261 is not alone sufficient proof that any mixing has occurred. EPA continues to bear the burden of proof in any individual case to show that mixing has occurred. As a point of information, EPA proposed on January 11, 1985, that used oil used as fuel with a chlorine content exceeding 4000 ppm total chlorine would be presumed to be mixed with hazardous waste. [See 50 FR 1691.1692.]

3/ In contrast, used oil that contains hazardous constituents but has not been mixed with hazardous waste and does not exhibit a characteristic may be used as a dust suppressant. This is because used oil is not presently listed as a hazardous waste.

Because the ban applies to hazardous waste and materials mixed with hazardous waste, a mixture containing dioxin is subject to the prohibition only when the dioxin comes from a hazardous waste

or when the material is otherwise a hazardous waste. [As stated in footnote 2, the presence of a hazardous constituent is not alone sufficient proof that mixing has occurred.]

USED OIL LISTING

The HSWA requires EPA to propose a listing determination for used car and truck crankcase oil by November 8, 1985, and to make a final listing determination on all used oils by November 8, 1986. [Section 3014(b) of the amended RCRA.] Under the interpretations discussed above, any used oils eventually listed as hazardous waste would be prohibited from use as a dust suppressant.

cc: Mark Greenwood, OGC

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
Seattle, Washington 98101

JUN 25 1985

REPLY TO ATTN OF: M/S 533

MEMORANDUM

SUBJECT: Prohibition on Use of Hazardous Waste for
Dust Suppression or Road Treatment

FROM: Charles E. Findley, Director
Hazardous Waste Division (M/S 529)

TO: John H. Skinner, Director
Office of Solid Waste (WH-562)

One of the interpretations in your June 6, 1985 subject memorandum is of concern. Specifically, the concern is that the interpretation may encourage the mixing of characteristic hazardous waste to be "disposed" through use as a dust suppressant. We fail to understand the basis for the interpretation listed as the fourth bullet on page 2 of the subject memorandum. The statutory language clearly states that any waste, used oil, or other material which is contaminated or mixed with any hazardous waste identified or listed under Section 3001 cannot be used for dust suppression or road treatment.

Any solid waste exhibiting a characteristic is a hazardous waste under Section 3001. If waste, used oil, or any other material is contaminated (i.e. contains) or is mixed with such characteristic hazardous waste (unless the only characteristic exhibited is ignitability) then that waste, used oil, or material cannot be used for dust suppression or road treatment--irrespective of whether it exhibits the characteristic. We fail to understand how any other interpretation of the statutory language can be made.

The interpretation in your memo, in fact, would tend to encourage mixing of characteristic hazardous waste with waste, used oil, or other material and hence avoid regulation if the resulting mixture no longer exhibits the characteristic. The mixture rule under §261.3 allows such an "exemption" with respect to the Subtitle C regulations. The statutory amendment does not provide such an exemption for such mixtures with respect to the ban as a dust suppressant.

The interpretation (fourth bullet) in your memo concludes that "...the material being used for dust suppression must actually be a hazardous waste." That conclusion appears to be contradictory to the

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statutory language. We assume the interpretation in your memo is based on first applying the mixture rule of §261.3, then determining if the resultant mixture is a hazardous waste. The statutory language would not appear to allow the regulatory mixture rule to be applied as a means to avoid the ban.

We strongly urge reconsideration of the interpretation.

cc: Waste Management Division Directors, Regions 1-9
Mark Greenwood, OGC