

# United Kingdom Quality Ash Association Environment Agency and Waste Issue Update Newsletter

**Issue 1 - Date: 03 November 2003**

## ***Introduction***

During recent weeks many people have contacted the UKQAA about the various rumours and articles in the Construction News. We felt that we should keep interested parties up-to-date on the situation. The following is the first of these updates, which contains a summary of what has occurred so far and our latest understanding of this complex problem.

## ***Summary***

In August 2003 the UKQAA were contacted by a concerned grouting contractor that the Environment Agency had informed them they would require 'Waste Management Licences (WML)' to fill a cavern in the Walsall area with Pulverised Fuel Ash (PFA) grout. It transpired that the contract in question was the Bosty Lane, Walsall contract. This job was remediating an old cavern that had failed in 2002, blighting the houses and closing the road. It is a Walsall Metropolitan Borough Council contract, funded by English Partnerships. It became clear the Environment Agency (EA) had decided that various European Court rulings had changed the definition of waste and the point at which a waste ceases to be a waste. Therefore, they now considered PFA was a waste and remained a waste until it was finally 'recovered', e.g. it was mixed with cement and water in the grout mixer. Consequently the mixing operation required a WML. An application for a WML takes between 4 and 12 months to be processed.

PFA was exempt from waste management licensing as described in DOE Circular 11/94, which specifically and unequivocally states PFA shall be treated as a by-product. The EA stated that DOE 11/94 was invalid and could no longer be used to give exemption to PFA, therefore PFA would require WML's on a site by site basis. The Joint Environmental Programme (JEP), an electricity industry wide panel of environmentalists and experts, has been discussing the situation with PFA and waste with the Environment Agency since 2001. It is clear from these discussions there is a very different interpretation of the European Case law for the power industry does not believe PFA offered for sale is a waste, which has been confirmed by an expert barrister on environmental law. However, DOE 11/94 gives an exemption anyway. During very recent discussions that resulted from the EA decisions at the Bosty Lane contract, JEP asked the direct question whether DOE 11/94 had been withdrawn, remembering that the EA had said it was 'invalid'. The EA had to agree it had not been withdrawn, but restated it was invalid. There also have been long discussions as to when a material is 'recovered'.

A waste can be processed in some manner and become a product. There are considerable difficulties in defining the point when a material is recovered. The electricity industry has always considered that PFA offered is fully 'recovered' as it is sold as an alternative to sand, when used in grout or fill applications. It would appear the EA view is that PFA for fill applications is fully recovered as it requires no final processing. However, PFA when used for grouts is still a waste until it is processed by mixing it with cement and water to form the grout. The electricity industry argues that the PFA is being sold as an alternative to sand and the mixing of grout is not part of the recovery process, however, the EA do not concur with this view.

While it is clear the EA have decided when PFA is or is not to be treated as a waste, they have also suggested the UKQAA should be involved with the WRAP Aggregates Forum. This body is working on defining when a material ceases to be a waste. Subsequently the UKQAA have joined this forum, but feel the decision has already been made by the EA simply from their actions!

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The EA have issued (23 September 2003 – Internal Note 1 – Understanding the Definition of Waste) an internal document explaining their logic for the definition of waste. This document, as all EA documents, is

### What is the Agency's approach?

This note is not an instruction to staff to actively seek out activities involving waste. We will be focussing our efforts on ensuring that new regimes are implemented in a way that properly takes account of the broadened scope of waste. Where we are called on to take a view on whether something is waste, the principles set out in this note should be followed.

We recognise that a number of the activities now caught by regulation will be low risk. In deciding whether and how to take enforcement action we will act in accordance with our published Enforcement and Prosecution Policy. Priority should be given to those activities causing or with the potential to cause pollution of the environment or harm to human health.

#### How are we taking this forward?

The purpose of this document is to help communicate recent changes to the scope of the definition and provide a consistent approach to decision making. We are also:

- working with Government to ensure that Circular 11/94 is revised and that the regulatory and strategic impacts are addressed as far as possible;
- scoping the impacts of these changes to ensure that we have the necessary tools and training to ensure consistent application and that resource impacts are identified and managed accordingly; we anticipate that internal roll out will be completed this year; and
- discussing the issues and implications with key external stakeholders.

in the public domain. The EA's approach is given as follows in this document:

English Partnerships are believed to be challenging this decision by the EA in relation to the Bosty Lane contract. Changing the contract from PFA to sand to grout the cavern would involve considerable extra costs. In addition, PFA has many technical advantages over sand for grouting.

### **Government and European Consultations**

The UK government issued a consultation document called "Proposals for amendments to the Waste Management Licensing Regulations 1994 (as amended), June 2003. This document calls for proposals to replace DOE Circular 11/94. Comments had to be in by 23 September 2003. The UKQAA has responded and asked for PFA and associated products when used for all possible construction applications to be included. Responses in a similar vein were also sent by the power generation companies and JEP. It is our understanding that this exemption route may be a solution to the situation and dialogue is ongoing with DEFRA on this matter. Lists of possible applications are currently being prepared and will be proposed to DEFRA.

Additionally, there is a European consultation document called "COMMUNICATION FROM THE COMMISSION, Towards a thematic strategy on the prevention and recycling of waste, 27.5.2003". This document is reviewing various aspects of the European waste strategy. One relevant statement says "*Ensuring recycling is both easy and clean. In some cases, implementation of EU waste law may have led to unnecessary burdens on the recycling industry. Such problems need to be identified and solved. Additionally, common approaches for recycling could ensure that recycling businesses apply the best available technology.*"

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Responses to this document have to be received by 30 November 2003 and the UKQAA, JEP and the various power generation companies will be responding in detail. However, should you wish to respond yourselves, please do not hesitate to contact the UKQAA for copies of the consultation document or for an example draft response.

### ***Legal Interpretation***

The members of the UKQAA do not accept that PFA offered for sale is a waste, but a by-product. The EA decision to classify PFA as a waste in some applications, e.g. for grouting, hinges about the legal interpretation of the various European court cases and the EU Waste Directive. JEP and the UKQAA have employed a barrister to review the legal situation. The industry is reluctant to mount a legal challenge as this would be a very costly and time consuming operation. While we believe our interpretation of the law is correct, it is estimated that this would take 3 years before being resolved. This time period would have considerable effects on the grouting markets for PFA, if there is any market left. We believe the practical solution is through the DEFRA and EU Commission consultation documents.

### ***Lobbying***

The UKQAA has been lobbying numerous MP's and newspapers in an attempt to change the decision of the EA/DEFRA on this matter. We are asking everyone to raise this matter with their local MP, for in our experience if one can get enough political support these matters are resolved far more quickly. Should you require copies of the letters sent to date, please contact the undersigned?

We have written to the following people: Sir John Harman (Chairman of the EA), David Lidington (Shadow Secretary to the Environment), Emma Campbell and Chris Chown (DTI), Margaret Beckett (Secretary of State for DEFRA), Eliot Morley (Minister for Environment and Agri-Environment), Patrick McCormick MP, David Curry MP and the following newspapers: Christopher Booker of the Daily Telegraph, The Guardian, The Independent, the Financial Times, The New Civil Engineer, The Construction News and the Daily Mail.

A reply has been received from Sir John Harman, Chairman of the EA. This restated the EA view as outlined above. The UKQAA have subsequently replied, questioning the point of recovery issue and the level of consultation purported to have been made over the Bosty Lane contract. David Lidington asked whether we knew whether other European countries were taking a similar approach, which they are NOT. We subsequently replied with this information.

### ***Recent events***

**Construction News:** They have published 2 articles on the situation with PFA (16 and 23 October). These articles reiterated the situation as described above. They are still in contact with us and, hopefully, may publish more about this situation.

**MEP's on the Environment Committee:** It has recently been reported that individual MEP's on the Environment, Public Health and Consumer Policy Committee are calling on the European Commission to address questions raised on the distinction between waste and non-waste, as well as between recovery and disposal operations. The committee meeting takes place on 3 and 4 November 2003. It is clear from the tabled documents including a report and proposed amendments to the committee meeting there is much confusion as seen in the following extract:

The report by Johannes (Hans) BLOKLAND contains:

D. whereas in many Member States the definition of waste does not correspond to that given in Article 1 of Directive 75/442/EEC, although the obligation for it to do so has been in force since

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1993; whereas consequently unacceptable disparities exist between Member States (Italy has a definition which does not correspond - cf. judgments of the Court of Justice of the EC; Luxembourg has not implemented the EWC; Austria and the United Kingdom likewise apply disparate definitions),

E. whereas, partly in the light of the judgments of the Court of Justice of the EC concerning the scope of the definition of waste, a new definition of waste will not result in greater clarity

The following proposed amendments are of interest:

Amendment by Eija-Riitta Anneli Korhola ,Amendment 19, Paragraph 4

4. Does not question the current definition of waste ***but calls on the Commission to clarify the distinction between waste and non-waste in particular in cases of secondary raw material or a product, with regard to the aim of the Directive and the need to ensure that its effectiveness is not undermined***; urges all the Member States to incorporate the definition of waste laid down in Article 1 of Directive 75/442/EEC in their domestic legislation; considers that, if necessary, the Commission should make use of its powers to force the Member States concerned to do so;

Amendment by Renate Sommer, Rainer Wieland and Karl-Heinz Florenz, Amendment 20, Paragraph 4 a (new)

***4a. Calls on the Commission to make the existing concept of waste in Directive 75/442/EEC more specific, and in particular to define the point at which an object can no longer be regarded as waste by establishing objective criteria, such as a positive market price, compliance with specified quality standards and direct use in the production process;***

Amendment by Eija-Riitta Anneli Korhola, Amendment 41, Paragraph 11 a (new)

***11a. Calls on the Commission to formulate clear conditions for the definition of the waste disposal and waste recovery operations, and actively monitor their proper implementation;***

This highlights the importance of responding to the EU consultation document described above. We await the outcome with interest.

### ***Conclusions***

It is clear that there is much confusion throughout Europe about the definition of 'waste' and the implementation of the EU Waste Directive. It would appear the UK EA have taken the most rigid interpretation of the directive and various court cases. However, they are not seeking confrontation or actively seeking 'activities involving waste'. PFA has not been singled out by the EA and it is clear that these requirements could equally be applied to numerous by-product materials!

The short term solution would appear to be through the DEFRA Exemptions route, which is being actively pursued. However, the electricity industry does not rule out any course of action – for we do not accept that PFA when sold for construction purposes is a 'waste'!



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Should you wish to discuss any aspects of the above, have any information that may assist or to obtain copies of the documents referred please contact the undersigned.

A handwritten signature in black ink, appearing to read "Lindon K. A. Sear".

***Lindon K. A. Sear, BSc, PhD, FICT Technical Officer<sup>i</sup>***

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<sup>i</sup> Note: While every effort has been made in this newsletter to ensure the statements made and the opinions expressed are a safe and accurate guide to the situation, no liability or responsibility can be accepted in this respect by the author and publishers, e.g. the United Kingdom Quality Ash Association.