

Issue 2 - Date: 05 December 2003

Introduction

This newsletter is a summary of the situation relating the classification of PFA as a waste and associated matters following on from Issue 1 (3 November 2003).

Summary

In many respects there has been little change in the situation as far as we are aware. The Environment Agency (EA) are still of the same opinion that numerous by-product/co-product/recycled materials are to be classified as wastes and that they are not 'recovered' until they are finally processed, e.g. for PFA grout the mixing of the cement, PFA and waste is classified as part of the recovery process and requires a Waste Management Licence (WML). The UKQAA dispute this interpretation on the basis that PFA is a direct replacement for a naturally occurring aggregate, e.g. sand, in many applications and is fully 'recovered' when it leaves the power station. However, the UKQAA, the Joint Environmental Programme (JEP) and the Association of Electricity Producers (AEP) all agree that PFA should not be classified as a 'waste' and the EA's interpretation of the law is flawed.

Government and European Consultations

There have been two consultation documents in circulation over recent months:

- "Proposals for amendments to the Waste Management Licensing Regulations 1994 (as amended) - A consultation paper, June 2003"

The UKQAA has replied to this document; see the letter on our web site, commenting on a number of aspects of the proposals. Responses had to be submitted by 23 September 2003. Subsequently, JEP/AEP/UKQAA have met with DEFRA representatives and discussed the exemptions in more detail and further proposals have been made to allow PFA and the other ash products to be used through the exemptions route.

- "COMMUNICATION FROM THE COMMISSION - Towards a thematic strategy on the prevention and recycling of waste, 27 May 2003"

The UKQAA has responded and made the following proposals:

Proposals

The UKQAA would suggest the following proposals (Specific proposals in italics):

1. **The definition of 'waste':** *As in Article 1(a) of Directive 75/442, 'waste' is defined as 'Any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.' This should not change.*
2. **The definition of 'by-product':** *We consider the two tests for defining a 'by-product' should be:*
 - a. *The reuse of the goods, materials or raw materials is not a mere possibility but a certainty.*
 - b. *That the goods, materials or raw materials should have a high degree of likelihood that they can be used without any further processing prior to reuse.*
3. **The definition of when discarding has taken place:** *We consider this should be:*

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- a. *Discarding does not take place when substances, objects, products including by-products, intermediate products or secondary products are suitable in their existing form either to be used in industrial and commercial (production) processes or to be placed on the market for further use or consumption. The suitability for use in industrial processes can be assumed in particular if the substances in question meet any available specifications for these processes.*
4. **The definition of recovery:** *We think 'recovery' should be defined as:*
 - a. *'Any action intended to recover or use the material or the energy contained in the waste.'*
5. **The point at which a material is recovered/ceases to be a waste:** *We would suggest that previously 'discarded' materials should be classified as 'products' and as a result 'fully recovered' at a distinct and early point in their production cycle. In our opinion the point at which a 'material ceases to be a waste' should be defined as:*
 - a. *'When a material leaves the production factory premises, in response to an order for delivery to the customer who made that order and who has a beneficial use for that material, it shall be considered recovered and cease to be classified as a waste.'*

This would alleviate the need for waste management licenses, excessive bureaucracy, etc at the customer's site.
6. **Environmental Risk Assessment:** *In order to alleviate the discrimination against recycled materials we believe that the process of environmental impact and risk assessment should be extended to cover all construction applications and that all materials should be assessed to a common framework of environmental impact assessment. This should assess the overall impact and identify the best available technique to minimise this impact.*
 - a. *This Environmental Impact and Risk Assessment should be carried out for which a certificate of satisfaction should be issued by the Environment Agency for every construction contract. This assessment should describe the scope, duration and size of the contract.*

For practical reasons we feel there should be a limit to the size of contract above which these requirements should apply, to allow smaller contractors to work without excessive bureaucratic hindrance.

There is another EU Directive on waste that has just been published called "Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on waste (Codified version) (presented by the Commission), 27-11-03". This document collates a number of existing directives into a single document and as such does not change the situation on waste that exists.

Legal Interpretation

JEP/AEP/UKQAA have sort legal opinion as to whether PFA is classified as a waste. An experienced barrister has concluded that PFA and similar products that are destined to be sold are NOT wastes and shouldn't be involved with WML's or similar. In order to persuade the EA that their interpretation of EU Directives and EU Court rulings is erroneous our legal opinion will be submitted to the EA in the near future. The industry is reluctant to mount any direct legal challenge through the courts as this may take up to 3 years, by which time the existence of the ash recycling industry may have ceased.

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Codes of Practice – a possible solution?

The UKQAA have become involved with WRAP (see www.wrap.org.uk) Aggregate Forum. This body, as well as promoting the use of recycled aggregates is in the process of developing specifications for quality and general guidance documents that define when a material is 'recovered'. However, the UKQAA has had a 'Code of Practice' for some considerable time, since 2000. This was suggested by Steve Lee of the EA some years ago, it was produced, but we could not persuade anyone from the EA to assist or comment on the draft document. Like the UKQAA, WRAP sees the EA's position as a serious threat to the recycling industry.

Lobbying

Though numerous letters have been sent to many MP's and Ministers, few have bothered to reply. Sir John Harman did respond and the UKQAA replied to that response. However, to date no reply has been received to our second letter, though it is our understanding a reply is being prepared within the EA.

One of member's letters to his MP, the Right Hon David Curry, has been responded to by Dr Paul Leinster on behalf of Barbara Young, Chief Executive to the EA. The letter suggests that contractors should be obtaining exemptions to Waste Management Licensing through the 1994 regulations. To register for an exemption the contractor has to supply:

- The name and address of the establishment or the undertaking;
- The activity which constitutes the exempt activity; and
- The place where the activity is carried on.

The letter continues to express disappointment that construction companies are reluctant to use or recover a product that has been labelled a waste, but states that *'the stigma of waste is not something that the Agency alone can change.'* It continues by saying the EA intends to clarify these issues in an article for Construction News, to be published soon. We are not aware such an article has been published to date. As the UKQAA consider PFA is not a waste – we believe it is within the EA's power to remove the stigma from PFA and other similar by-products.

An article was published by Construction News on 20-11-03 on the plight of ScotAsh, one of our members. ScotAsh, a joint venture between Scottish Power and Lafarge Cement, have invested heavily in new plant and equipment to process PFA. However, they feel under threat by the ruling by the EA/SEPA and the consequential uncertainty on the waste issue, even though there are considerable environmental benefits in using a by-product like PFA!

Another relevant publication was an article in 'Wastes Management' magazine of October 2003. This article reviews the Waste Directive and the effects of the various EU court rulings. It concludes that the law is not clear in this area and that some certainty is needed to the benefit of both the regulators and industry, though if previous case law and Government guidance is anything to go by, this may be a vain hope!

Conclusions

It is clear it is not only the coal fired power station ash industry that is suffering from the problems of being defined as a 'waste', but a wide range of recycling and recovery industries. While the government and EA may desire that construction companies use 'wastes' in preference to natural materials, it is clear

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that the burden of increased bureaucracy and scrutiny are not conducive to their use. Should the government and/or the EU wish to achieve their recycling targets and to reduce overall environmental impacts then they MUST resolve this issue, and quickly. A proper and legally binding definition of 'by-product', 'recovery' and 'recycling' would be start. Additionally a sensible interpretation of when a material is or is not a waste would be even more beneficial. So far it would appear 'while Nero fiddles, Rome is burning' seems to be the approach!

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



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ⁱ 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.