



Connecticut Department
of
**ENERGY &
ENVIRONMENTAL**

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RCRA Docket
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460.

Docket No. EPA-HQ-RCRA-2012-0426.

Dear Sir or Madam:

The Connecticut Department of Energy and Environmental Protection (“CT DEEP”) has reviewed EPA’s December 2, 2008 Notice of Data Availability (“NODA”) entitled “Waste Management and the Retail Sector: Providing and Seeking Information on Practices To Enhance Effectiveness to the Resource Conservation and Recovery Act Program.” CT DEEP’s comments on the proposed rule are detailed in the following numbered sections.

1. CT DEEP Supports the General Concept that there Should be Some Type of Appropriate Industry-Specific Regulatory Approach Concerning Hazardous Waste Requirements for the Retail Sector.

In recent years, it has become evident to CT DEEP that the retail sector generates significant amounts of hazardous waste and has some unique and challenging issues with respect to these wastes as compared to other, more traditional industry sectors such as manufacturing. CT DEEP has performed inspections at a numerous retail facilities in Connecticut in recent years. In performing these inspections, CT DEEP has observed that the application of traditional RCRA requirements to the retail sector is problematic for a number of reasons, including:

- The large number of products many retailers manage which could be potentially hazardous when discarded. In a typical retail pharmacy or department store, for example, there could be many products for sale that could potentially be hazardous when discarded, including but not limited to such common consumer items as the following:
 - Rubbing alcohol, lighter fluid, and nail polish remover (all of which may be ignitable hazardous wastes when discarded).

- Drain and oven cleaners (which may be corrosive hazardous wastes when discarded).
- Aerosol products (which may be ignitable, reactive, and/or toxic hazardous wastes when discarded).
- Lice shampoo (contains the TCLP constituent Lindane).
- Selsun blue and other itchy scalp shampoos (can contain the TCLP constituent selenium).

This large number of potentially-hazardous products carries with it the need to perform a large number of hazardous waste determinations, which many retailers may not be particularly well-trained or able to do.

- Seasonal changes in product offerings, which increases the total number of potentially hazardous materials that may need to be discarded, and creates leftover stock when the season has ended. For example, during summer, the retail facility may stock charcoal lighter fluid (ignitable). In the winter, it may stock an aerosol car door lock de-icer (also ignitable). If these products are not all sold at the end of the season, a decision to discard them would potentially generate a hazardous waste.
- Frequent turnover of staff. In order to know how to properly handle consumer products that require management as hazardous waste when they are discarded, it is often necessary for staff to be trained or to learn these issues on the job. The retail sector's high turnover rate makes keeping all staff appropriately informed of these issues challenging.
- Compliance with traditional RCRA waste containerization requirements (e.g., use of DOT containers, keeping containers closed) may be difficult or duplicative. For example, discarded products often remain in their original packaging that was designed to securely contain the material during transport, storage, and handling. If the integrity of the packaging is maintained along with use of appropriate BMPs to prevent spills, these discarded products may have a significantly lower risk for release as compared to other RCRA wastes.
- Management of consumer products returned by customers. These products may be managed in any of several different ways, including being disposed of directly from the retail facility, sent to a reverse distribution center, or returned to the supplier (possibly for credit). Some of these avenues of management may involve discard or disposal, whereas others may involve reuse or recycling. All of these factors can complicate the regulatory status of these materials under RCRA and make it difficult to determine how the materials should be managed.
- Lack of environmental management systems and on-site technical support. CT DEEP has observed that many retail facilities, including facilities that are part of large retail chains, lack well-thought-out management systems and procedures for the management of discarded consumer products. As a result, staff at these facilities often do not have clear direction on what to do with these materials. Although most retail facilities have

corporate environmental health and safety staff that are knowledgeable of hazardous waste and other environmental requirements, CT DEEP has observed that there is often a disconnect between these corporate EH&S staff and individual stores' management and staff.

2. CT DEEP Has Observed Numerous Instances of Improper Management or Disposal of Hazardous Waste at Retail Facilities.

In the numerous inspections CT DEEP has performed at retail facilities in recent years, we have identified a number of instances of improper management or disposal of hazardous waste. Examples include:

- A large retail facility with a garden center was disposing of broken bags of fertilizer and pesticides in a wooded area adjacent to the garden center. Testing of the dumped material indicated that it failed TCLP for hazardous pesticides.
- Another garden center facility had failed to clean up and remove many broken bags of fertilizer and pesticide products. The situation was so bad that the floor in that area of the garden center was covered with spilled material. To make matters worse, the area was open to the weather, and rainwater was washing these materials down a drain and into nearby surface waters, causing a fish kill.
- CT DEEP has observed numerous instances in which retail facilities were disposing of hazardous wastes into the on-site trash dumpster. The discarded materials included discarded consumer products and pharmaceuticals, including prescription pharmaceuticals.
- CT DEEP has also observed several instances in which lead-acid batteries that had been returned by customers were being mismanaged (e.g., stored outdoors in unprotected areas, leaking, etc.).

Pursuant to the types of waste mismanagement described above, CT DEEP has pursued enforcement actions pursuant to these inspections, both individually (i.e., against single retail locations), and collectively (i.e., against large corporate retail chains). This enforcement has included 29 Notices of Violation, 19 Consent Orders with Penalties, and two referrals to the State Attorney General. Total penalties collected in these actions totaled over 2.4 Million dollars. These enforcement actions involved nearly 50 different individual retail locations operated by nine different companies. The violations cited in these actions not only involved RCRA requirements, but also FIFRA and Clean Water Act (specifically stormwater) requirements.

It should be noted that the penalties assessed in these cases were not arbitrarily set, but were carefully calculated using CT DEEP's Civil Penalty Policy, which takes into account both the gravity of the violations and the potential for harm to human health and the environment. As a result, the violations for which these penalties were assessed cannot be dismissed as mere

technical violations of administrative requirements, but instead involved serious mismanagement that posed significant potential for harm.

3. Simple Deregulation is Not the Appropriate Solution for the Retail Sector.

In comments submitted to EPA by some retail associations, various levels of deregulation have been suggested, up to and including a complete exemption from RCRA requirements for consumer products that are discarded from retail facilities. While CT DEEP recognizes that the retail sector faces some unique challenges with respect to the management of the waste that it generates, CT DEEP does not feel that simply exempting retail facilities from hazardous waste requirements is the solution to these problems. As noted in the previous comment, CT DEEP has observed numerous instances where wastes were seriously mismanaged and/or improperly disposed of, resulting in major enforcement actions with penalties. Given the unreasonable risk to public health and the environment that these mismanagement scenarios pose, CT DEEP believes that exempting these wastes to be unacceptable, and, in the worst case, would allow these kinds of activities to continue without the means for state or federal environmental agencies to properly address them.

4. The Universal Waste Rule Would Be an Appropriate Way to Regulate Discarded Consumer Product Wastes.

In light of the above, CT DEEP believes that the classification of consumer product wastes generated in the retail sector as Universal Wastes would be a way to strike the right balance between providing an appropriate level of regulatory relief while at the same time ensuring that adequate protective measures remain in place and that wastes generated from the retail sector are properly managed and disposed.

CT DEEP would also note that designation of consumer products as Universal Waste may help many retailers avoid having to notify under RCRA as Large Quantity Generators (LQGs), as universal waste generation does not contribute towards a facility's monthly hazardous waste generation rate. Avoiding LQG status has substantial administrative and financial cost savings both for the retailers and state environmental agencies, while still ensuring a safe and protective regulatory structure. CT DEEP, like many other state environmental agencies, is concerned about the trend of substantial increases in LQG notifications by the retail sector and the corresponding demands it places on authorized state programs including the frequency of inspections based on US EPA guidelines, data management for RCRAinfo, BRS reporting, etc.

In addition, CT DEEP believes that the designation of these consumer products as Universal Wastes should be subject to certain limitations, including:

- The scope of the Universal Waste listing should be limited only to consumer goods, which is to say products that are marketed to the general public. The listing should not include other wastes that may be generated at retail facilities, such as wastes from facility maintenance (e.g., painting), fuel spills, or other wastes. CT DEEP believes that the listing should also not apply to vehicle maintenance wastes such as spent parts washer solutions, used oil, and other vehicle fluids. CT DEEP believes that vehicle maintenance

facilities have already become reasonably familiar with how to handle these wastes, and that these wastes do not present the same difficulties as consumer products (e.g., reverse logistics, etc.) that would justify listing as Universal Wastes. And lastly, CT DEEP believes that pharmaceutical wastes should not be included in the retail sector Universal Waste listing, since these wastes present their own set of issues that justify being managed separately (e.g., controlled substance issues, toxicity issues, etc.).

- The designation as Universal Wastes should extend all the way back to the point that the item is no longer wanted or needed – i.e., the actual retail facility. More specifically, the designation as Universal Waste should not begin downstream of that point, such as at a reverse distribution center. CT DEEP believes this is necessary to ensure that these consumer goods are handled in accordance with basic safety and good housekeeping procedures that are outlined in the Universal Waste Rule while they are being stored at the retail facility. CT DEEP believes that a basic level of training (such as that required by the Universal Waste Rule) is also necessary to ensure that employees involved in the management of these materials are familiar with how to properly identify and handle them.

CT DEEP would also note that by listing consumer goods generated in the retail sector as Universal Wastes would address some of the major issues that have been raised by retail sector stakeholders, such as dealing with episodic generation events, hazardous waste determinations, and reverse distribution. More specifically:

- Under a Universal Waste listing for retail consumer products, episodic waste generation events would essentially become a non-issue since in most cases retail facilities would be continue to be classified as small quantity handlers of Universal Waste, even during a large episodic event. As a result, the requirements that retail facilities would be subject to would not be likely to change over time as they would under the regular hazardous waste generator requirements.
- Hazardous Waste Determinations would not be as critical an issue, since retailers could choose to manage all potentially-hazardous consumer products (i.e., those that are of a chemical nature) as Universal Wastes. And, they could do so without fear of triggering a higher hazardous waste generator status. For many retailers, management under a Universal Waste system could be done in the same way that they currently manage them – namely through a reverse distribution system (see next comment).
- Listing retail consumer products as Universal Wastes would “legitimize” the current system of reverse distribution that many retail facilities already use by making such facilities subject to Universal Waste handler requirements as opposed to RCRA storage facility requirements. As a result, retailers could continue to use the same systems that have allowed them to efficiently manage these items and either re-sell, liquidate, or dispose of them, while at the same time ensuring that they are properly handled and disposed.

5. Issues Concerning Aerosol Cans.

In Section IV.F. of the NODA, EPA requests information about aerosol cans. CT DEEP recognizes that the management of aerosol cans is one of the difficult issues that retail facilities face. Perhaps the biggest issue with respect to managing aerosol cans is properly characterizing them for waste disposal purposes. Discarded aerosol cans generated in any setting (retail or otherwise) can be difficult to characterize, since they can be hazardous in a wide variety of ways. For example:

- **Ignitability.** Aerosol cans may be ignitable as a result of containing an ignitable liquid such as alcohol, or due to the use of an ignitable propellant such as propane, butane, or isobutane.
- **Corrosivity.** Aerosol products such as spray oven cleaners may have a sufficiently high pH so as to be classified as a corrosive hazardous waste.
- **Reactivity.** CT DEEP believes that aerosol products may be “capable of detonation or explosive reaction if it is subjected to a strong initiating force or if heated under confinement” as per 40 CFR 261.23(a)(6). More specifically, aerosol cans are only required by federal product safety regulations to be capable of withstanding heating to a temperature of about 150°F before the cans fail due to over-pressurization of the contents. Cans heated above this temperature may suddenly and explosively fail. If the aerosol can contains ignitable liquids or gases and there is a source of ignition present, such as a spark or flame, this can result in an explosion similar to what is referred to in the hazardous material incident response as a “BLEVE” (Boiling Liquid Expanding Vapor Explosion).

Through coordination with Connecticut’s State Fire Marshal’s office on the management of aerosol cans, CT DEEP has become aware of at least two incidents in Connecticut where the explosion of a single aerosol can has resulted in significant structural damage to a building. One such case is illustrated by the photo in Attachment 1 to these comments. This photo shows an incident that occurred a number of years ago at a motel in Groton, CT. The occupants of the motel room shown in the photo had left a candle burning near a can of hair spray while they were away. The can overheated and failed, and the resulting explosion was so severe that it physically blew the entire bay window out of the wall of the building, as well as a significant portion of the exterior siding adjacent to the room.

The other case involved an aerosol can that was left on a hot stove in a private home. The can overheated and failed, and the resulting explosion blew the walls of the kitchen all the way out to the exterior, load-bearing walls of the private home. Fortunately, no one was seriously injured in either of these explosions, but these two incidents demonstrate that potential for aerosol cans to be an explosive hazardous under certain conditions.

- Toxicity. Certain aerosol cans may contain TCLP constituents above hazardous waste concentrations (e.g., pesticides or herbicides).
- Listed Commercial Chemical Products. Certain unused aerosol products may contain a “U” or “P” listed commercial chemical product as the sole active ingredient, making them a hazardous waste when discarded.

6. Classification System for Aerosol Cans.

On page 8934 of the NODA, EPA notes that some members of the retail sector have suggested that aerosol cans be grouped into four categories, namely:

1. “Aerosol cans that contain non-hazardous propellant and the remaining can contents are non-hazardous (either by listing or by characteristic);”
2. “Aerosol cans that contain propellants that are traditional ignitable fuel sources such as propane or butane, but the remaining contents are non-hazardous (either by listing or by characteristic);”
3. “Aerosol cans that contain propellants that are traditional ignitable fuel sources such as propane or butane, and the remaining contents are also hazardous (either by listing or by characteristic);” and,
4. “Aerosol cans that contain ignitable hazardous propellants that are not traditional fuel sources, and the remaining contents may or may not be hazardous (either by listing or by characteristic).

It is not apparent to CT DEEP what the purpose or potential benefit might be to classifying aerosol cans in this way. Although the above classification system does seem to highlight the two factors that can make an aerosol can a hazardous waste (i.e., the hazardousness of the propellant and the hazardousness of the contents), it seems to miss one combination of these factors and inexplicably duplicates a second combination. More specifically the above classification system omits the following category of aerosol cans:

- Aerosol cans that contain non-hazardous propellant, but the remaining can contents are hazardous (either by listing or by characteristic). An example of such an aerosol can might be a spray herbicide containing 2,4-D (a TCLP constituent) with carbon dioxide as a propellant.

In addition, item 4 in the above classification appears to duplicate items 2 and 3 in the system for reasons that are not clear. The only difference between items 2 and 3 and item 4 in the classification system is that the former involve an ignitable propellant that is “a traditional fuel source” whereas the latter involves an ignitable propellant that is not “a traditional fuel source.” Is the issue here that aerosol cans containing propellants that are traditional fuels which are burned for energy recovery might be considered exempt from hazardous waste requirements under the provisions of 40 CFR 261.2(c)(2)(ii)? If so, CT DEEP can understand the reason for

classifying these aerosol cans separately. However, this factor is only relevant if the ignitable propellant is, in fact, burned for energy recovery. Although a particular aerosol can (or batch of aerosol cans) might be managed in this way, and therefore be exempt from RCRA, the same aerosol cans would not be exempt and would be fully-regulated hazardous wastes if sent for incineration. Furthermore, the exact disposition of the aerosol cans may not be known until they are at a point one or more steps downstream of the retail facility, making this distinction of limited usefulness.

CT DEEP believes that the above classification system would be rendered unnecessary, if, as suggested in comment 7 below, EPA lists aerosol cans as Universal Wastes. More specifically, doing so would eliminate much of the regulatory burden of managing aerosol cans as hazardous wastes, and would make it practical for generators of aerosol cans to manage all of their aerosol cans in the same way (i.e. as Universal Waste), regardless of whether or not they are hazardous. CT DEEP believes that many generators would choose to do this to simplify the logistics of managing aerosol cans, and to avoid the burden of determining whether or not individual cans are hazardous wastes. Instead, generators could simply send all of their cans (unused, partially used, or even empty) to a single facility where they could be properly categorized and managed. This, in turn, would avoid the possibility of accidentally placing non-empty aerosol cans in the trash, and avoid the fire and safety hazards that such improper disposal might cause.

7. EPA Should Consider Separately Listing Discarded Aerosol Cans as Universal Wastes.

Discarded aerosol cans are a commonly-generated hazardous wastes in the retail sector, either as unused products (e.g., overstock, damaged, past shelf life, or leftover seasonal items), or as a result of being used at the facility (e.g., in cleaning, interior decorating, or repair activities). However, aerosol cans are also generated in a wide variety of other settings, including industrial and manufacturing facilities, vehicle maintenance and repair facilities, government and institutional facilities, building maintenance, and, of course various residential settings (either single or multiple-family). Many non-retail facilities do not generate any other type of hazardous waste, or if they do, the only other wastes that they generate are Universal Wastes. As a result, listing aerosol cans as their own category of Universal Waste would not only benefit the retail sector, but many other sectors as well. CT DEEP therefore recommends that EPA list aerosol cans as Universal Waste in their own right – that is, in a category that is separate from discarded consumer products.

CT DEEP has observed that aerosol cans are often mishandled, and are often thrown in the trash (either before or after use). CT DEEP believes that listing aerosol cans as Universal Waste would reduce the incidence of such improper disposal, and the hazards that it represents (see previous comment regarding the potential for aerosol cans to be reactive in certain circumstances). In addition, listing aerosol cans as Universal Waste would facilitate the recovery and recycling of the scrap metal value of these cans, consistent with the fundamental objective of RCRA to promote resource conservation and recovery.

In listing aerosol cans as Universal Waste, CT DEEP believes that EPA should consider including all types of commercially-available aerosol products, whether full (unused) or partially-empty. CT DEEP believes that such a listing would greatly reduce the burden of

determining which aerosol cans require special handling and disposal, and that many generators would opt to handle all of their aerosol cans (hazardous or not, empty or full) as Universal Waste, if only for reasons of simplicity. Once generators of aerosol cans become aware that they are Universal Waste, CT DEEP believes that such generators would take steps to manage them properly, as they have done with other Universal Wastes such as batteries and mercury-containing lamps. This is particularly an advantage for non-traditional generators of hazardous waste, including the retail sector, since they are often unfamiliar with hazardous waste generator requirements, but are likely to be much more familiar with Universal Waste requirements since they are likely to already generate, at a minimum, mercury-containing lamps.

Listing aerosol cans as Universal Waste would also be consistent with the criteria for listing wastes and Universal Wastes as specified in 40 CFR 273.81. Following is an item-by-item assessment by CT DEEP of how aerosol cans would meet these criteria:

- a. *The waste or category of waste, as generated by a wide variety of generators, is listed in subpart D of part 261 ... , or (if not listed) a proportion of the waste stream exhibits one or more characteristics of hazardous waste identified in subpart C of part 261... [40 CFR 273.81(a)]*

As noted in CT DEEP's comment 5 above, many products that are marketed in aerosol cans are either listed or characteristically hazardous, or utilize propellants that are hazardous.

- b. *The waste or category of waste is not exclusive to a specific industry or group of industries, is commonly generated by a wide variety of types of establishments (including, for example, households, retail and commercial businesses, office complexes, conditionally exempt small quantity generators, small businesses, government organizations, as well as large industrial facilities. [40 CFR 273.81(b)]*

Aerosol cans are not specific to any particular industry or group of industries, but are, indeed nearly ubiquitous throughout industry, commerce, and institutional facilities. They are generated by all types of generators, from the very largest, to the very smallest. They are, as the above criteria states, generated in "households, retail and commercial businesses, office complexes, conditionally exempt small quantity generators, small businesses, government organizations, as well as large industrial facilities."

- c. *The waste or category of waste is generated by a large number of generators (e.g., more than 1,000 nationally) and is frequently generated in relatively small quantities by each generator. [40 CFR 273.81(c)]*

Information in EPA's NODA clearly demonstrates that aerosol cans are generated in well more than 1,000 facilities nationally. In addition, based on CT DEEP's experience with aerosol cans during hazardous waste inspections, such cans are often generated in small numbers, and are often costly and difficult to manage in accordance with full hazardous waste generator requirements.

- d. *Systems to be used for collecting the waste or category of waste (including packaging, marketing, and labeling practices) would ensure close stewardship of the waste. [40 CFR 273.81(d)]*

Many aerosol cans are already subject to US DOT hazardous materials shipping requirements, even when they are not wastes, and would continue to be subject to these requirements once discarded. This would help to ensure proper packaging, labeling, and help to ensure proper downstream management. In addition, CT DEEP believes that if EPA were to list aerosol cans as Universal Waste, commercial waste management companies would quickly react to this new market niche with services designed to make management of aerosol cans as Universal Waste easy for generators as possible. This has already occurred with other Universal Wastes. For example, many commercial waste management companies provide special services such as custom-made shipping containers that are compliant with DOT requirements for Universal Wastes such as mercury-containing lamps and batteries.

- e. *The risk posed by the waste or category of waste during accumulation and transport is relatively low compared to other hazardous wastes, and specific management standards ... (e.g., waste management requirements appropriate to be added to 40 CFR 273.13, 273.33, and 273.52 and/or applicable Department of Transportation requirements) would be protective of human health and the environment during accumulation and transport. [40 CFR 273.81(e)]*

Although, as noted elsewhere in these comments, aerosol cans may present significant risks to human health and the environment if mismanaged (e.g., heated under confinement, or punctured), they are safe if properly managed. More specifically, if they are properly packaged in a manner so as to ensure that propellant and/or contents will not be discharged during storage and transport, and they are kept away from potential sources of heat and ignition, they do not present a significant risk to human health and the environment. However, CT DEEP believes that if EPA decides to list aerosol cans as Universal Waste, there should be appropriate, waste-specific conditions to ensure that aerosol cans are properly packaged and kept away from sources of heat or ignition.

- f. *Regulation of the waste or category of waste under 40 CFR part 273 will increase the likelihood that the waste will be diverted from non-hazardous waste management systems ... to recycling, treatment, or disposal in accordance with Subtitle C of RCRA. [40 CFR 273.81(f)]*

CT DEEP believes that the regulation of aerosol cans as Universal Waste will have the effect of diverting aerosol cans from non-hazardous waste management systems, such as solid waste landfills. CT DEEP has observed over the years that aerosol cans are frequently thrown in the regular trash at generation sites. However, with designation as a Universal Waste, CT DEEP believes that awareness regarding the proper management of aerosol cans will increase, especially among small generators that are not familiar with hazardous waste requirements, but are familiar with the Universal Waste rule as the result of their generation of mercury-containing lamps or batteries. CT DEEP also believes that

listing as Universal Waste will make aerosol cans more economical to properly dispose of or recycle, reducing the temptation for generators to improperly dispose of them. In addition, listing aerosol cans as Universal Waste would facilitate the recovery and recycling of the scrap metal value of these cans, consistent with the fundamental objective of RCRA to promote resource conservation and recovery.

- g. *Regulation of the waste or category of waste under 40 CFR part 273 will improve implementation of and compliance with the hazardous waste regulatory program.* [40 CFR 273.81(g)]

As noted above, CT DEEP currently sees a lot of aerosol cans being disposed of in the regular on-site trash containers, in violation of RCRA disposal requirements. By making the proper recycling or disposal of aerosol cans easier and more affordable, CT DEEP believes that the listing of aerosol cans as Universal Waste will improve compliance with the hazardous waste regulatory program. This will also have the effect of reducing the number of violations CT DEEP has to cite for improper management of aerosol cans and the number of enforcement actions it has to pursue, both of which will allow CT DEEP to re-allocate staff resources to other efforts.

8. Comments Regarding the Challenges Posed by the Large Number of Products that Retail Facilities Can Carry.

Both in the preamble to the NODA itself and in comments submitted to EPA by Walmart, The Home Depot, and the Retail Industry Leaders Association during EPA's listening events, one of the issues that was raised was the fact that many retail facilities handle very large numbers of products, many of which may change seasonally or in some other way over time, and the associated problems that this raises with determining which retail products would be regulated as hazardous wastes when discarded. Although CT DEEP acknowledges this problem, CT DEEP also feels that many retailers already have the basic systems in place to deal with this issue. More specifically, most large retailers already have extensive computerized product inventory and reverse distributions systems already in place that can be accessed by scanning a product's bar code. These systems could easily be modified to include a "flag" for items that are hazardous waste when discarded. Indeed, on page 8930 of the NODA, EPA describes Walmart's development of this exact type of system of inventory control for their retail stores.

A related problem that some of these retailers described in their comments was that they do not have readily-available means to determine whether or not a consumer product that they sell is hazardous waste when discarded. However, one solution to this problem is for the retailers to require their suppliers to provide this information as a condition of sale (e.g., by putting it in the Material Safety Data Sheet ("MSDS") that they provide with the products). This would be particularly effective for large retail chains that purchase large amounts of product, and would have the additional benefit of providing the same information to smaller retailers that may purchase products from the same suppliers as the large retail chains.

9. Comments Concerning the Point of Generation.

On page 8930 of the NODA, EPA specifically asks for comments concerning “where and when a hazardous waste determination must be made.” CT DEEP believes that this must occur at the retail facility, and that EPA should not allow this determination to be made downstream, such as at a reverse distribution center. Allowing waste determinations to be made downstream would be contrary to congressional intent of RCRA to ensure a “cradle to grave” responsibility for hazardous wastes. In addition, allowing waste determinations to be made downstream would create a large loophole in the regulatory framework, and would create a potentially dangerous precedent to eliminate the generator’s responsibility that is so important within the RCRA law. It is CT DEEP’s understanding from direct dialog with reverse distributors that requiring waste determinations at the retail facility will not adversely affect or disrupt the ability of a reverse distributor to receive materials deemed Universal Waste.

Also, as noted in comment 4 above, listing retail consumer products as Universal Wastes would eliminate or reduce many of the potential difficulties associated with making the retail facility the point of generation. At the same time, this approach would ensure that the retail facility properly handles these materials, and they do not end up being thrown in the trash, down the drain, or otherwise improperly disposed.

10. Response to Comments Submitted to EPA by Walmart.

As noted in the NODA, Walmart submitted comments on the issue of the regulation of the retail sector under RCRA pursuant to EPA’s listening events scheduled in response to Executive Order 13563. Walmart’s submittal to EPA was entitled “Comments to the United States Environmental Protection Agency Regarding Executive Order 13563 – Improving Regulation and Regulatory Review.” Many of the issues raised in Walmart’s comments were also raised in similar comments submitted by The Home Depot and the Retail Industry Leaders Association. CT DEEP read these comments with interest, and would like to offer its own perspective on some of the issues raised in these comments, as an authorized state agency that is implementing the federal hazardous waste program.

- a.) Applicability of RCRA to small businesses is not unique to the retail sector. On page two of its comments, Walmart states that the retail sector “... finds itself confounded when RCRA hazardous waste regulations, crafted with complex industrial plants in mind are applied to neighborhood department stores, grocery stores, pharmacies, restaurants, or convenience stores.” While CT DEEP acknowledges that the traditional RCRA regulations may not be a particularly good fit to the retail sector for the reasons express earlier in these comments, we disagree with the notion, as implied in this comment, that it is somehow unusual or inappropriate for RCRA regulations to apply to small businesses. Substantial risk to public health and the environment is not restricted to large businesses. In fact EPA has advocated that authorized states more frequently inspect smaller sources regulated under RCRA as well as other laws such as Section 112R of the Clean Air Act. In addition, the universe of regulated RCRA generators, has, from the beginning, included many small, commercial businesses such as dry cleaners, auto servicing shops, and auto body repair shops. The issue is

not so much that retail sector businesses should not be subject to RCRA as it is that the issues that are unique to this sector merit appropriate alternative regulation under RCRA. As noted earlier in these comments, CT DEEP believes that de-regulation is not the answer to the problems experienced by the retail sector in complying with RCRA requirements; rather, the answer is to list consumer product wastes as Universal Wastes.

- b.) Difficulties with hazardous waste determinations. On page two of its comments, Walmart also states that performing hazardous waste determinations are “an impossible burden” for retail facilities for several reasons, including: (1) the large number of products that many retailers carry that could potentially be hazardous; (2) the fact that many consumer products’ ingredients and concentrations are considered trade secrets by the manufacturer; and, (3) MSDSs often do not provide adequate information to determine whether or not a particular consumer product is hazardous. While CT DEEP acknowledges the difficulties that retailers face in determining which of the products they carry could potentially be hazardous when discarded, we do not believe that performing hazardous waste determinations is “an impossible burden.” First, it should be noted that the retail sector is not alone in facing difficulties characterizing commercial “off-the-shelf” type products. Many businesses (including large manufacturing, industrial, and institutional generators of hazardous waste) use these same products (e.g., in office areas, for building maintenance, etc.) and must determine whether or not they are hazardous waste when discarded. Secondly, as noted above, a retail giant like Walmart is certainly in an excellent position to require all of its suppliers to include in their MSDSs information concerning the RCRA status of the product when it is discarded. On this point, CT DEEP supports the idea, as expressed in footnote 1 in Walmart’s submittal of making it a national requirement for manufacturers to provide such information in MSDSs for the products that they produce. Such a requirement would not only benefit retailers, but all users of these types of products.
- c.) The argument that many consumer product wastes generated from retail facilities are the same as wastes generated in consumers in their homes and therefore should not be subject to RCRA. On pages 2-3 and 6-7 of its comments, Walmart makes the argument that many of the wastes generated at its stores are exactly the same as wastes generated by consumers in their homes (which are exempt from RCRA). Walmart further argues that many of these products are also subject to consumer health and safety regulations and are recognized as safe for human consumption. Walmart concludes that these facts imply that there is “little logic to RCRA requiring that a consumer product ... be managed as a hazardous waste.” While CT DEEP acknowledges Walmart’s first two points, we do not agree with its conclusion that these consumer products should be exempt from RCRA when discarded by retail facilities.

Firstly, the exemption from RCRA for household hazardous wastes is a result of specific Congressional intent, as set forth in the RCRA Statute, that the RCRA regulations should not apply to wastes generated by consumers in their homes. This

provision, codified at 40 CFR 261.4(b)(1), does not apply to the materials themselves (i.e., consumer products), but to the location in which they are generated (i.e., a residence). As EPA has stated in policy and guidance numerous times, the household hazardous waste exemption only applies to waste that are: (1) generated by individuals in a residence; and, (2) are typical of wastes generated by residents in their homes. EPA has consistently interpreted this provision not to apply to the same materials generated in non-residential settings (e.g., retail facilities).

Secondly, although consumer health and safety regulations are in place for many retail consumer products, these requirements do not address the end-of-life issues associated with these products. A product that may be safe when used by the consumer could pose a hazard if released into the environment. For example, an insecticide product may be safe when properly used by an individual consumer, but could pose a hazard to human health or the environment if dumped in a waterway.

Thirdly, Walmart's reasoning with respect to consumer products fails to take into account the volumes of discarded consumer product that a retail facility (especially a large one such as a Walmart Superstore) is capable of generating as opposed to an individual resident. A single homeowner might discard one or two items at a time, whereas a large retail facility is capable of disposing of *cases* of the same items at any one time. While one or two items thrown in the trash by a consumer in their home would not likely present a significant hazard to human health or the environment, a large retail facility disposing of cases of items at a time in the trash easily could. For example, if a retailer were to dispose of several cases of an ignitable paint thinner in their garbage roll-off, and a source of ignition were to be present, a large and dangerous fire could result. And there is also the issue of improper disposal. As noted earlier, CT DEEP has specific experience with a retail garden center that disposed of dozens of bags of fertilizer and pesticide products in a wooded area adjacent to the garden center. A dumping event of this magnitude is not likely to happen at a residential site, but could easily occur at a retail facility.

Lastly on this point, the fact that the same consumer products may be generated from retail facilities and consumers alike simply supports that these materials meet one of the primary considerations for being listed as a universal waste to ensure that a safe and appropriate collection, management and disposal infrastructure is in place without imposing all the regulatory standards of RCRA.

- d.) The issue of returned products. On page 3 of its comments, Walmart notes that some of the discarded consumer products that it manages result from products that are returned by customers. Walmart further argues that regulating such returned products as hazardous waste when they are discarded functions as a disincentive to accepting such returns. While CT DEEP acknowledges these points, we also believe that these problems would be largely resolved by listing discarded consumer products (including returned products) as Universal Wastes. On this point, CT DEEP notes that many "big box" stores gladly accept other types of Universal Waste, such as mercury-containing lamps and batteries. Clearly these stores are willing to comply

with the Universal Waste requirements and accept these items as a service to their customers; it stands to reason that the same retailers would not have much difficulty in following the same requirements for returned products that may be hazardous.

On page 4 of its comments, Walmart also describes the difficulty in determining when returned products should be considered wastes, especially if reverse distribution is involved. CT DEEP acknowledges that this is a problem, and would offer the following thoughts with respect to this issue:

- CT DEEP believes that a decision to discard a material makes it a waste regardless of where that occurs – whether this occurs at the retail facility, or at a downstream reverse distribution center.
 - CT DEEP also believes that to not be considered to be discarded, there must be a significant likelihood that the material will be resold by the retailer (e.g., at a different store), or liquidated (i.e., sold to another retailer).
 - CT DEEP does not believe that products that are returned by a customer and immediately placed back on the shelf by the retailer would need to be classified as wastes. CT DEEP believes that return by a customer does not in itself constitute discard; however, if once received from the customer the retailer decides to discard the item rather than re-shelve it, it should be considered a waste at that point in time.
 - CT DEEP also believes that there is great value to retailers putting its return, reversed distribution, and product disposal protocols in writing, for example in the form of corporate directive detailing how the company handles excess inventory, damaged and recalled products, and returned items. In its inspection and enforcement at retail facilities, CT DEEP has found that such written directives clarify exactly how these materials will be managed and allow us to confirm that they will be properly managed and that their ultimate disposition is appropriate and in compliance with RCRA. CT DEEP believes that EPA should consider requiring retailers to develop such directives as a part of any reduced regulation that they may consider for this industry (including but not limited to listing discarded commercial products as Universal Waste).
- e.) Vitamins and Dietary Supplements. On page 5 of its comments, Walmart explains that it manages certain vitamins and other dietary supplements as hazardous waste when they are discarded, since they can fail the TCLP test for selenium or chromium. Walmart then asks, “[d]oes this make sense?” In answering this question, CT DEEP would point out that a product that may be healthful when taken at the proper dosage (e.g., one or two pills per day) may be hazardous to human health and the environment when disposed of in bulk quantities (e.g., cases of expired vitamins). CT DEEP views the management of vitamins and health supplements as hazardous waste is no different from the management of discarded pharmaceuticals, which are

also intended for human consumption. As the old epidemiologist's adage goes, "the poison is in the dose." A single dose of chromium in your morning multi-vitamin is good for you, but thousands of doses of chromium dumped irresponsibly could be harmful to human health and the environment. CT DEEP also believes that the Universal Waste Rule could provide substantial regulatory relief with respect to the management of vitamins and dietary supplements. That is, if consumer products were listed as Universal Wastes, these products could be managed under the streamlined requirements of the Universal Waste Rule. CT DEEP is also aware that some pharmacies are managing vitamins and dietary supplements (as well as over-the-counter drugs) the same way that they handle their pharmaceutical products being disposed of - i.e., through a commercial hazardous waste vendor that specializes in the classification, packaging, transportation, and ultimate disposal of these materials. CT DEEP is aware that there are a number of such companies that can provide these services to pharmacies and other generators of pharmaceutical waste, including very small generators.

- f.) Regulation of Aerosol Cans. On page 7 of its comments, Walmart raises the issue of aerosol cans. More specifically, Walmart states that aerosol cans being discarded at retail facilities are "identical in nature to aerosol cans sold to, and discarded by, the general public" and that "most aerosol cans are regulated as hazardous waste solely because of the potential Ignitability (D001) of the propellant." On the first point, CT DEEP would reiterate the points made in CT DEEP's comment 10.c. above. On the second point, CT DEEP would disagree that the majority of the hazardous waste issues with aerosols is related to the propellant that is used. A large number of the aerosol products that are sold also contain ignitable ingredients. For example, hair spray and spray deodorants and colognes often contain large amounts of alcohol. Similarly, spray paints are often oil-based and contain ignitable solvents such as toluene and xylene.

Walmart often states that "it simply does not make sense to manage discarded or empty aerosols in the back of a retail store as hazardous waste when thousands of identical aerosol cans sit on shelves awaiting sale and ultimate disposal by consumers." CT DEEP disagrees with this statement. First of all, any product that is salable has a positive value and as a result tends to be managed in a manner consistent with its economic value. However, once a product is no longer wanted or needed, this economic incentive disappears, and the material becomes much more likely to be abandoned, forgotten about, mismanaged, or improperly disposed. Indeed, this distinction between virgin products and discarded materials is arguably the very foundation that the entire RCRA program is based upon. Secondly, as noted in CT DEEP's comment 10.c. above, a retail facility is capable of accumulating and improperly managing much larger quantities of materials than individual consumers. An individual consumer might throw away one or two aerosol cans at a time, but a retailer might throw away cases of aerosol cans at a time. As noted in CT DEEP's comment 5 above, a single aerosol can is capable of producing significant explosive force under the right conditions. Imagine the hazards to human health and the

environment that a few *cases* of aerosol cans might be capable of if mismanaged (e.g., thrown in a trash dumpster).

CT DEEP would also reiterate its comment that EPA should consider specifically listing aerosol cans as Universal Waste, and that it do so as a category separate from discarded consumer goods. Doing so would not only facilitate the proper management of aerosol cans from the retail sector, but would also facilitate the proper management of discarded aerosol cans generated in all other sectors of industry and commerce.

This concludes CTDEEP's comments on the NODA. Please contact Ross Bunnell of my staff if you should have any questions on the foregoing. Mr. Bunnell may be reached by phone at (860) 424-3274, or by email at ross.bunnetl@ct.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'R. Isner', with a long, sweeping horizontal stroke extending to the right.

Robert C. Isner, Director
Waste Engineering & Enforcement Division

Cc: Terri Goldberg, NEWMOA
Attachment

ATTACHMENT 1
PHOTO OF AEROSOL CAN EXPLOSION INCIDENT
GROTON, CT

