



March 13, 2020

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RE: S-1683/A-4267 - Enacted January 21, 2020

Dear Assistant Commissioner Pedersen and Director Aiello:

On behalf of the New Jersey Asphalt Pavement Association (“NJAPA”) and the New Jersey Concrete and Aggregate Association (“NJCAA”), we submit this letter in connection with the recently enacted legislation (S-1683/A-4267), known as the “Dirty Dirt Bill” (the “Legislation”). As set forth herein, we write to confirm that the Legislation does not apply to asphalt or recycled asphalt pavement (“RAP), which is material milled from pavement and road construction related work. We would appreciate receiving the Department’s confirmation of the inapplicability of the Legislation to asphalt and RAP by March 31, 2020 in light of the upcoming registration requirements under the Legislation scheduled to commence in April. NJAPA and NJCAA reserves all claims, rights and defenses to protect the rights of its members in connection with this matter.

I. The Legislation is Not Intended to Cover Asphalt or RAP

By its terms, the Legislation does not apply to asphalt or RAP. The goal of the Legislation is to expand the licensing and background check requirements for people and businesses working with hazardous waste, solid waste and soil or debris that is recycled as fill. Specifically, the Legislation prohibits businesses from providing soil and fill recycling services without the appropriate registration, license, or prior approval issued by the DEP. The Legislation was enacted in response to the NJ Commission of Investigation report that focused on “how New Jersey had become a haven for criminally tainted garbage and recycling entrepreneurs who were kicked out of the business due to heightened vigilance and stronger rules elsewhere.” Asphalt and RAP are not included in the materials of concern that the Legislation intends to address.

The Legislation defines “soil and fill recyclable materials” as “non-putrescible aggregate substitute, including, but not limited to, broken or crushed brick, block, concrete, or other similar manufactured materials; soil or soil that may contain aggregate substitute or other debris or material, generated from land clearing, excavation, demolition, or redevelopment activities that would otherwise be managed as solid waste, and that may be returned to the economic mainstream in the form of raw materials for further processing or for use as fill material.” Notably, between the Third Reprint and the final law, the Legislation eliminated all references to “asphalt,” “pavement” and “asphalt-based roofing” in the definition of “soil and fill recycling materials.” The removal of these terms from the Legislation is consistent with the fact that asphalt, RAP (pavement/millings) are already regulated by separate statutes and regulations, and thus are not covered by the Legislation.

II. RAP is Regulated by Existing, Controlling Statutes and Regulations

RAP cannot be considered “soil that may contain aggregate substitute or other debris or material . . . that would otherwise be managed as solid waste” as it has long been recognized and handled as a “source separated recyclable material under New Jersey’s Solid Waste Management Rules. *N.J.S.A. 13:1E-3*. As set forth in detail in the Department’s own Guidance documents, it has long recognized many recycling uses for RAP, specifically exempt from permitting and licensing requirements. Moreover, the Recycled Asphalt Pavement Legislation (S3521 and A5914) (“RAP Legislation”) was signed into law on January 15, 2018, in order to further expand these recycling and permissible uses for RAP. As the Department is aware, the RAP Legislation carefully considered whether there were any environmental impacts of RAP, and confirmed the results of an extensive scientific study conducted over a period of two years by NJDOT and experts from Columbia, Rowan and Stony Brook Universities concluding that RAP does not leach and can be safely used for the recycling purposes identified in the RAP Legislation. Accordingly, the proper handling, storage and use of RAP is already regulated under existing statutes and regulations and should not be subject to the Dirty Dirt Legislation.

Moreover, even if the Dirty Dirt Legislation could arguably cover RAP, it would be in conflict with the RAP Legislation and would be unenforceable. When statutes cannot be harmonized and the legislature deals with the same subject matter in a detailed manner in one and a general manner in the other, the detailed statute should prevail. *Lewis v. Bd. of Trustees, Pub. Employees’ Ret. Sys.*, 366 N.J. Super. 411, 417 (App. Div. 2004). The RAP Legislation is specific to RAP whereas the Legislation is not. Therefore, the RAP Legislation must control with respect to recycling and requirements for handling RAP.

Finally, under the RAP Legislation, NJDEP was required to adopt rules implementing the RAP Legislation by October 2018. NJDEP did not meet this requirement, but instead we understand is in the process of preparing draft guidance on the use of RAP. While this guidance is still subject to ongoing review and revisions, there has never been any mention of an A901 licensing requirement in the guidance, nor would there be any need. The Department never raised any such issue during the numerous stakeholder meetings on this topic, nor any concern regarding the need to license the transport, handling or use of RAP in an “A901” context.

As such, NJDEP cannot now use this new Dirty Dirt Legislation as a backdoor to regulate RAP activity, particularly contrary to intent and terms of the RAP Legislation.

III. Compliance with the Legislation for RAP Would Result in Extreme Economic Hardship/Negative Consequences

The removal and transport of RAP (road construction millings) from State/NJDOT paving jobs is primarily handled by a large number - literally hundreds - of third party owner-operators across the State. Due to the limited notice of the enactment of the Legislation, it is likely that many of these entities are not even aware of the new licensing requirements. Further, given the limited resources of these independent, largely single vehicle operators, compliance would be nearly impossible; the extensive information and application requirements required by the Legislation would be overwhelming to them. Accordingly, while we do not believe the Legislation applies at all to RAP, it is very likely that most of these third-party owner/operator entities would simply be unable to comply with the requirements of the Dirty Dirt Legislation. The result would be that the road construction industry would not have available or economic means to properly transport RAP and asphalt material from their job sites after the Legislation’s registration requirements take effect just a short time from now.

For the reasons set forth herein, we look forward to receiving the Department’s confirmation of the inapplicability of the Legislation to asphalt and RAP. Again, we kindly request your response by March 31, 2020.

Very truly yours,

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