



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 3 2010

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

Chris S. Leason
Counsel to The Fertilizer Institute
2575 East Camelback Road
Phoenix, AZ 85016

Dear Mr. Leason:

This is in response to your letter dated June 1, 2010 on behalf of The Fertilizer Institute (TFI) regarding EPA's interpretation of the exemption provided in Section 311(e)(5) of the Emergency Planning and Community Right-to-Know Act (EPCRA). You requested EPA to clarify our interpretation of Section 311(e)(5), which exempts chemicals used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer from the definition of hazardous chemical and thus EPCRA Sections 311 and 312. Your specific request related to the second part of the exemption, "... is a fertilizer held for sale by a retailer to the ultimate customer."

Your letter states that many of your clients' operations include selling fertilizers to their customers as well as blending fertilizers to meet the individual needs of their customers. You state in your letter that as a result of this blending no chemical reaction occurs, therefore, the fertilizer used prior to the blending and the resultant fertilizer mixture created after the blending would be exempt as "a fertilizer held for sale by a retailer to the ultimate customer." In support of your request, you cite to prior Q&A guidance the Agency has issued, which denied an EPCRA 311/312 reporting exemption for chemicals held and blended for the purposes of producing a fertilizer.¹ You argue that, because no chemical reaction occurs when your clients mix two or more source fertilizers and no new fertilizer is created, the prior Q&A guidance is inapplicable and the resultant mixed fertilizer "held for sale by a retailer to the ultimate customer" should be exempted from EPCRA 311/312 reporting. You assert that the mixing done by your clients is more akin to a household or consumer product exemption the Agency previously interpreted under Section 311(e)(3) of EPCRA, concerning the mixing of paint base colors to meet a customer's request for a custom shade of paint.²

The Agency, however, stands by its prior Q&A guidance regarding the blending of chemicals to produce a fertilizer and does not agree that the mixing of fertilizers would fall under Section 311(e)(5) exemption. The exemption in Section 311(e)(5) is for "a fertilizer held for sale

¹ See EPCRA Frequent Questions - Applicability of the Exemption under Section 311(e)(5) (Updated July 2010), located at <http://www.epa.gov/oem/content/epcra/epcra-qa.htm>

² See EPCRA Frequent Questions - Applicability of the Exemption under Section 311(e)(3) (Updated July 2010), located at <http://www.epa.gov/oem/content/epcra/epcra-qa.htm>

by a retailer to the ultimate customer." Such a fertilizer is one that is merely held for sale, not one that is mixed or formulated. This reflects an intent to limit the exemption to mere retailing. Congress' intent was to focus Section 311/312 reporting on manufacturers and wholesalers - those are facilities that typically have large quantities of fertilizers, and that use and manufacture a wide range of chemical compounds. Congress appreciated that such manufacturers and wholesalers presented significant risks that needed to be addressed by emergency response authorities, but that mere retailers did not. Assuming arguendo that Congress' intent is ambiguous, the above interpretation is one that EPA adopts as being the most reasonable interpretation of the statute. Therefore, consistent with the Agency's prior Q&A guidance, the amount of chemicals intended for blending and the new product should be reported under Sections 311 and 312 if the reporting thresholds are exceeded.

The Q&A guidance you cite concerning the mixing of paint colors to create a custom shade does not apply here. The exemption in Section 311(e)(3) is for "any substance to the extent it is . . . present in the same form and concentration as a product packaged for distribution and use by the general public." The determination you cite dealt with cans of paint that were "in the same form and concentration" and were "product[s] packaged for distribution and use by the general public." Such packaged products fell squarely within the exemption of Section 311(e)(3). But that determination is not relevant to the question of whether chemicals being mixed are thereby "held for sale by a retailer to the ultimate customer." In addition, the examples you provide explain that fertilizer retailers mix varying concentrations of nitrogen, phosphorous, and potassium to meet their individual customers' soil conditions and crop needs. It does not follow that such retailers are selling fertilizers in the same "form and concentration" as those that are "packaged for distribution and use by the general public." Based on the above, the Agency disagrees that your clients qualify for an exemption under either Sections 311(e)(3) or (5) of EPCRA for the mixing or blending of chemicals to produce a fertilizer.

If you have any technical questions or need further clarification, please contact Sicy Jacob, Office of Emergency Management, at (202) 564-8019.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. S. Tulis', with a long horizontal flourish extending to the right.

Dana S. Tulis, Acting Director
Office of Emergency Management