

July 12, 2012

Ms. Cheryl Falvey
Office of the General Counsel
Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

RE: Advisory Opinion Request –Recycled Tire Product Classification

Dear Ms. Falvey,

On behalf of Public Employees for Environmental Responsibility (PEER), I write to formally request the Consumer Product Safety Commission (CPSC) issue an advisory opinion classifying 1) recycled tire products, including rubber mulch and playmats used and marketed for use on playgrounds, as children’s products, and 2) artificial turf fields incorporating crumb rubber installed at an elementary school as children products. PEER believes that such products should be subject to heightened regulation as specified in the Consumer Product Safety Improvement Act (CPSIA) and related laws.

PEER works nation-wide with government scientists, land managers, environmental law enforcement agents, field specialists, and other resource professionals committed to responsible management of America’s public resources. PEER’s membership drives the organization’s campaigns for greater environmental health and protection. PEER and its members are concerned that products containing recycled tires are not being subjected to the heightened standards put in place to protect children from dangerous chemicals.

In 2008, Congress passed the CPSIA, a law which greatly increased the regulation of children’s products. These increased regulations include a lead content limit of 100 parts per million (ppm) as of August 14, 2011, and requiring third-party testing and verification of compliance with all standards as of January 1, 2012 for all products manufactured after December 31, 2011. 15 U.S.C. §§ 1278a, 2063 (2006). The products that these regulations apply to are “children’s products”, defined as “a consumer product designed or intended primarily for children 12 years of age or younger.” 15 U.S.C. § 2052 (a)(2) (2006). To

determine whether a product is a children's product, and thus if the standards apply, factors considered include (1) a statement by the manufacturer, (2) whether the product is represented for use by children 12 years of age or younger, and (3) if the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.

PEER believes that these guidelines clearly cover tire derived products including playmats, rubber mulch, and artificial turf when installed in an area for children younger than 12 years old. Playmats and rubber mulch are intended for use on a playground by children, they are advertised for use by children, and the public would regard the product for use by children ages 12 and under. Artificial turf that is installed at an elementary school is marketed towards children and is intended for use by children primarily under the age of 12 years old. The public would also regard a field installed at an elementary school as being for use primarily by children. Therefore, these products should be subjected the more rigorous standards imposed upon children's products, including stricter lead standards, third party testing, and labeling requirements.

This classification would also fall in line with CPSC's own classification of similar products. The CPSC currently regulates playground equipment such as swings, slides, and ramps. See Age Determination Guidelines, U.S. Consumer Product Safety Comm'n, Sept. 2002, 177-90; see generally Public Playground Safety Handbook, U.S. Consumer Product Safety Comm'n., Nov. 2010. The CPSC also regulates sporting equipment, such as balls, bats, nets, and goals. See Age Determination Guidelines, U.S. Consumer Product Safety Comm'n., Sept. 2002, 191-97. If the Commission would not accept lead levels above the statutory standards in a slide, they should not accept them in the rubber mulch below the slide; if a ball cannot contain above a certain amount of lead, neither should the artificial field upon which the children are playing.

PEER can find no evidence that CPSC has made any definitive determination regarding the status of such products. In a meeting with the Artificial Turf industry on May 12, 2008, this question was raised, but not resolved. See Log of Meeting on Artificial Turf Products, May 12, 2008, available at http://www.cpsc.gov/library/foia/meetings/mtg08/artificialturf5_12.pdf. At that meeting, a Commissioner, Commission staff and artificial turf industry leaders discussed the growing public concern over the potential dangers artificial turf and other tire-derived products present to consumers, particularly lead. During this meeting, the issue of classification of artificial turf was mentioned. According to minutes from that meeting,

“Michael Gougisha [counselor to CPSC commissioner Thomas H. Moore] asked whether synthetic turf as used in artificial turf sports fields would be considered a children's product as defined by either U. S. Senate or House passed legislation. Walter Sander [Van Fleet Associates, Inc.] indicated that it wouldn't and Rick Doyle [President of the Synthetic Turf Council] indicated that the group would be addressing that issue in future Capitol Hill meetings. [CPSC] Commissioner [Thomas H.] Moore indicated that the children's product issue was important because as contemplated in legislation passed by

both Chambers, in general, children's products which contain lead above certain levels would be banned regardless to lead accessibility. Commissioner Moore also indicated that it is his position that children's products should not contain lead.” Log of Meeting on Artificial Turf Products, May 12, 2008.

After the meeting, Mr. Doyle wrote to Commissioner Moore:

“We are particularly appreciative of your admonition to ensure that our product does not become categorized as a ‘children's product’ within the meaning of eventual conference agreement on H.R. 4040. We have taken your comments to heart and are in the process of communicating our concerns to members of the conference committee.” Letter from Rick Doyle, President of the Synthetic Turf Council, to Thomas H. Moore, Commissioner of the Consumer Product Safety Commission (May 15, 2008), available at: http://www.cpsc.gov/library/foia/meetings/mtg08/artificialturf5_12.pdf.

Commissioner Moore replied:

“I do want to clarify that I did not admonish you to ensure that your product is not categorized as a ‘children's product’. However, I did inform you that, as contemplated in legislation passed by both the U.S. Senate and U.S. House of Representatives, in general, children's products that contain lead exceeding a defined amount would be banned regardless to accessibility.” Letter from Thomas H. Moore, Commissioner of the Consumer Product Safety Commission, to Rick Doyle, President of the Synthetic Turf Council (May 15, 2008), available at: http://www.cpsc.gov/library/foia/meetings/mtg08/artificialturf5_12.pdf.

This ambiguous nature of this exchange has created confusion which an advisory opinion can dispel. While the exchange does not appear to be a ruling either way on the classification of artificial turf playgrounds, it has nonetheless been taken by industry as a *de facto* classification that their playgrounds, play mats and other products designed to be used by children are somehow not a “children’s product.”

The artificial turf industry has adopted a voluntary lead standard in the wake of the 2008 controversy over artificial turf fields. CPSC Fiscal Year 2009 List of Voluntary Standards, available at <http://www.cpsc.gov/LIBRARY/FOIA/FOIA10/brief/fy09volstds.pdf>. In a follow-up meeting between the CPSC and various artificial turf industry representatives, it was mentioned that ASTM International (formerly known as the American Society for Testing and Materials) was looking into issuing voluntary standards for lead levels in artificial turf fields. Meeting regarding the voluntary standard process: <http://www.cpsc.gov/LIBRARY/FOIA/meetings/mtg08/Leadin11.pdf>.

In 2009, ASTM issued a voluntary standard (F-2765-09), with the goal that the lead standard should meet the children's product standard of 100ppm by 2011. These standards are, of course, voluntary. In addition, they are not subject to the same third-party testing or labeling requirements as children's products.

PEER can find no reference to potential classification or regulation regarding rubber mulch or playmats found on playgrounds made from recycled tires. Yet, it appears that the likelihood of dangerous exposure to lead by children using these products cannot be discounted.

According to a study released by the New Jersey Department of Environmental Protection in June 2012, artificial fields that contain tire crumb can contain highly elevated levels of lead, greater than the current allowed levels "An Evaluation of Potential Exposures to Lead and Other Metals as the Result of Aerosolized Particulate Matter from Artificial Turf Playing Fields" <http://www.nj.gov/dep/dsr/publications/artificial-turf-report.pdf>). This study concluded that its—

- Results raise "concerns with regard to potential hazards that may exist for individuals and in particular children who engage in sports activities on artificial fields";
- Lead "present in artificial turf fields can be resuspended by even minimal activity on the playing surface' and
- "Finding show that both inhalable PM [particulate matter], as well as inhalable lead (when present) are resuspended from even minor physical activity on an artificial surface."

The study was hampered by the unwillingness of schools with artificial turf field to have them tested. A total of 50 schools were approached by researchers and ultimately only 5 schools consented to testing their fields. The study concludes with this observation:

"For the present time, how widespread the presence of these high lead level fields is, is an unknown. At present the economic disincentive for schools or communities to measure the presence or absence of lead contamination appears to exceed any public concern for children's safety."

An advisory opinion by that the CPSC that playmats, rubber mulch, and artificial turf products that contain recycled tire material are children's products will effectively redress this dangerous disinclination to monitor for lead contamination. If classified as children's products, manufacturers will be responsible for compliance with all regulations related to such classification.

We are certain that CPSC agrees that children's safety is of utmost importance. Artificial turf, rubber mulch, and playmats that contain shredded tires present potential health risks to

children. These products should not be able to avoid the standards and third-party testing to which all children's products are subject, simply because the CPSC has not taken the step of classifying them.

PEER asks the Commission to act expeditiously on this request and thanks you for your prompt attention to this matter.

Sincerely,

Jeff Ruch
PEER Executive Director