

## *EPA's Amendments to the Standards for Hazardous Waste Generators*

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Last month, the U.S. Environmental Protection Agency published its amendments to, and reorganization of, the regulations governing generators of hazardous waste, 81 Fed. Reg. 85,732 (Nov. 28). These rules govern the hundreds of thousands of enterprises nationally that produce wastes characterized or listed as hazardous under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Sections 6901-91i. For the most part, these amendments do not change the requirements that generators face, but merely reorganize the regulations in a way that will make old guidance and citations obsolete. However, the final rule also codifies a number of EPA interpretations of the rules found in letters and memoranda that the EPA has written over the years. In addition, in some respects the rules will change when this rulemaking becomes effective on May 30, 2017.

Interestingly, the EPA did not address application of generator standards to retail operations. That issue has gotten some recent attention.

The RCRA is the federal waste regulatory statute. In Pennsylvania, the commonwealth regulates waste management under the Solid Waste Management Act, 35 Pa. Stat. Ann. Sections 6018.101 to .1003. Both the RCRA and more comprehensively the SWMA require persons who discard waste to take certain steps to be sure that waste goes where it is supposed to go. The person throwing something away is known as the "generator."

Hazardous waste is a subset of "solid waste" under the RCRA. Waste counts as "hazardous" if the EPA has placed that waste from a particular industrial (or other) process on a list of hazardous wastes or if it displays a hazardous "characteristic." Pennsylvania further regulates nonhazardous solid waste in various categories under the SWMA.

A generator has a duty to characterize its waste so that the waste is managed properly. This obligation has been recodified at 40 C.F.R. Section 262.11. Failure to accomplish the characterization properly can result in penalties and even criminal sanctions. Importantly, it can also cause waste management areas and vessels to become subject to onerous and expensive RCRA permitting obligations. Moreover, if the waste that should have been characterized as hazardous has been mixed with other waste and that mixed waste is still being managed subject to regulation, then the whole mixed waste stream can be subject to RCRA hazardous waste regulation and a much higher disposal cost.

The new rules codify the existing policy that this waste characterization must be performed "at the point of waste generation, before any dilution, mixing, or other alteration occurs ..." 40 C.F.R. Section 262.11(a). The question of when a material becomes a waste—where the "point of generation" is—can prove quite difficult. To cite one example, *General Motors v. Environmental Protection Agency*, 363 F.3d 442 (D.C. Cir. 2004), dealt with when the solvent used to clean out paint spray guns became a waste; all parts of the waste flow downstream of that point became subject to hazardous waste management regulation. Generators that are accustomed to first paying attention to waste identification when their waste has accumulated in their 90-day storage areas may want to re-visit their compliance procedures.

As before, the generator must use its knowledge concerning its own processes to determine if a waste is among the listed wastes.

In order to treat, store or dispose of waste that qualifies as hazardous one must obtain a permit under the RCRA and the SWMA. However, generators may accumulate their own wastes on their sites for a limited amount of time prior to shipment to a treatment, storage, or disposal facility (TSDF) and are exempt from the requirement to obtain a RCRA permit for their accumulation areas. The rules governing accumulation vary with the amount of hazardous waste that one generates in any given calendar month. To the consternation of some observers, the EPA emphasized that failure to comply with certain generator requirements could subject generators to enforcement for operating an unpermitted storage facility. This has arguably been EPA policy for decades, but the agency has rarely enforced generator violations in this manner and the renewed emphasis on this point has raised eyebrows.

The new regulations codify the past practice of dividing generators into three categories, now known as very small quantity (VSQG), small quantity (SQG), and large quantity (LQG) generators, 40 C.F.R. Section 262.13. VSQGs may treat their hazardous waste as if it were not hazardous (though the mismanagement of such waste could have cleanup consequences). In Pennsylvania, a nonindustrial generator would treat it as municipal solid waste. If it were mixed with waste from an industrial process, the waste would be residual waste, 25 Pa. Code Section 271.1 (definitions of "municipal solid waste" and "residual waste"). In order to be a VSQG in any given month, the generator cannot generate more than 100 kilograms (220 pounds—less than 27 gallons at the density of water) of hazardous waste or 1 kg of "acutely hazardous waste." Acutely hazardous wastes are listed in Section 261.31 of the regulations as "H" wastes or are off-specification discards or cleanup wastes from commercial chemical products listed in Section 261.33(e).

SQGs generate more than 100 kg and no more than 1,000 kg of hazardous waste and no more than 1 kg of acutely hazardous waste in any given month. SQGs may accumulate their wastes longer and are exempt from certain requirements, but they do have to identify their wastes and maintain records.

LQGs are subject to the full panoply of RCRA generator regulation. They will have accumulation areas set up on their facilities, waste tracking systems in place, and hauling arrangements. The new regulations allow SQGs to use a "satellite accumulation area" on the facility of a related entity that is a LQG. But for this provision of the new regulations, transportation of the waste from a SQG to a LQG would subject the LQG to the need to obtain a RCRA permit for the accumulation area.

Generators can shift from one category to another month-to-month. Just because a facility generates 1,500 kg of waste in one month from spoiled inventory or a ruined batch does not mean that that facility is forever a LQG. On the other hand, just because a facility rarely generates a hazardous waste does not mean that it can ignore these rules. The EPA emphasized that this is a month-by-month calculation, rejecting comments suggesting that the EPA should accept averaging accumulation over a period of months.

The EPA has in recent years recognized that the rules prior to these amendments did not fit particularly well for retail operations. Many retail products would be hazardous waste if disposed. One can buy solvents at the hardware store. Less obviously, certain pharmaceuticals, including over-the-counter items, are listed or characteristic hazardous waste when disposed. Aerosol cans pose a problem.

Indeed, aqueous waste with a pH below two is hazardous by reason of being characteristically corrosive, and some soda comes close.

When the retailer sells to a household, waste disposed by the household is excluded from the definition of hazardous waste by Section 261.4(b)(1) of the regulations. Waste from that household disposed in a landfill or burned in a resource recovery facility is similarly excluded from the definition of hazardous waste. However, the same items discarded by a retailer are not within the exclusion when those items pass their sell-by date, go out of season, have some other problem, or are returned by the customer.

Retailers may handle thousands of different products. They have difficulty knowing what would or would not be hazardous if discarded by the store. Moreover, many retailers have a "reverse distribution" system under which customer returns or expired items can be sent back to the distributor or manufacturer for distribution. Applying the RCRA to that process has posed cumbersome and expensive compliance challenges, and has also resulted in several high-visibility enforcement cases in which retailers have paid tens of millions of dollars in penalties.

In 2014, the EPA requested comment on these issues with a notice of data availability, 79 Fed. Reg. 8926 (Feb. 14, 2014). The EPA issued a "Strategy for Addressing the Retail Sector under RCRA's Regulatory Framework" on Sept. 12. See <https://www.epa.gov/hwgenerators/strategy-addressing-retail-sector-under-resource-conservation-and-recovery-acts>. However, that "strategy" strongly suggests that while the EPA will offer retailers some flexibility, it will not exempt reverse distribution or discarding of returns or recalls from the RCRA regulation entirely. Interestingly, the roughly contemporaneous recodification of the generator rules resolves almost none of the issues presented by application of the RCRA to the retail sector.

Thirty years ago, shortly after the Hazardous and Solid Waste Amendments of 1984 were enacted, a senior colleague of mine would regularly tell industrial clients that they had to treat their waste streams with the same care as their product streams. The recent amendments to the generator rules may improve the user-friendliness of the regulations for that effort. It is not so clear that they do the trick outside the industrial sector.

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